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No. 2249

United States
Circuit Court of Appeals
For the Ninth Circuit.

SOUTHERN PACIFIC COMPANY, a Corporation,
Plaintiff in Error,

VS.

JOHN WILBUR WARD,
Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of
the Southern District of California, Southern Division.

FILED

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County of
204



No. 2249

United States
Circuit Court of Appeals
For the Ninth Circuit.

SOUTHERN PACIFIC COMPANY, a Corporation,
Plaintiff in Error,

VS.

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Defendant in Error.

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Upon Writ of Error to the United States District Court of
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Names and Addresses of Attorneys.

For Plaintiff in Error:

J. W. McKINLEY, Esq., Pacific Electric Building, Los Angeles, California.

R. C. GORTNER, Esq., Pacific Electric Building, Los Angeles, California.

For Defendant in Error:

EDWARD E. COTHRAN, Esq., Russ Building, San Francisco, Cal.

Writ of Error.

UNITED STATES OF AMERICA—ss.

The President of the United States, to the Honorable the Judge of the District Court of the United States, for the Southern District of California, Southern Division, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a cause which is in the said District Court before you at the July, 1912, term thereof, wherein Southern Pacific Company, a corporation, is plaintiff in error, and John Wilbur Ward, defendant in error, and wherein John Wilbur Ward was plaintiff and Southern Pacific Company, a corporation, was defendant, manifest error hath happened to the great damage of said plaintiff in error, as by its complaint appears;

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then

under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the city of San Francisco, in the State of California, on the 10th day of January next, in the said United States Circuit Court of Appeals, to be then and there held, to the end that the record and proceedings aforesaid being inspected, the said United States Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable MELVILLE W. FULLER, Chief Justice of the Supreme Court of the United States, this 13th day of December, in the year of our Lord one thousand nine hundred and twelve.

[Seal]

WM. M. VAN DYKE,

Clerk of the United States District Court for the Southern District of California, Southern Division.

Allowed by

FRANK H. RUDKIN,
District Judge.

Service of the within writ of error and a copy thereof is hereby admitted this —— day of December, 1912.

Attorney for Defendant in Error.

I hereby certify that a copy of the within writ of error was on the 13th day of December, 1912, lodged

in the clerk's office of the District Court of the United States, Southern District of California, Southern Division, for the said defendant in error.

WM. M. VAN DYKE,

Clerk, U. S. District Court, Southern District of California, Southern Division.

By Chas. N. Williams,

Deputy Clerk.

[Endorsed]: C. C. No. 1,664. United States District Court, Southern District of California, Southern Division. John Wilbur Ward, Plaintiff and Respondent, vs. Southern Pacific Company, Defendant and Appellant. Writ of Error. Filed Dec. 13, 1912. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk.

In the District Court of the United States, Southern District of California, Southern Division.

JOHN WILBUR WARD,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,

Defendant.

Citation on Writ of Error.

United States of America—ss.

To John Wilbur Ward, Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held in the city of

San Francisco, in the State of California, on the 10th day of January, A. D. 1913, pursuant to a writ of error on file in the clerk's office of the District Court of the United States, for the Southern District of California, Southern Division, in that certain action No. 1,664, wherein Southern Pacific Company, a corporation, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment given, made and rendered against the said Southern Pacific Company, a corporation, in the said writ of error mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness, the Honorable FRANK H. RUDKIN, United States District Judge, for the Southern District of California, Southern Division, this 13th day of December, 1912, and of the Independence of the United States the one hundred and thirty-sixth.

FRANK H. RUDKIN,
United States District Judge for the Southern District of California, Southern Division.

[Endorsed]: No. 1,664. United States District Court, Southern District of California, Southern Division. John Wilbur Ward, Plaintiff and Defendant in Error, vs. Southern Pacific Company, Defendant and Plaintiff in Error. Citation on Writ of Error. Filed Dec. 23, 1912. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk.

Received copy of the within citation this 18th day of December, 1912.

EDWARD E. COTHRAN,
Attorney for Plff. and Deft. in Error.

*In the Circuit Court of the United States, in and for
the Ninth Circuit, for the Southern District of
California, Southern Division.*

JOHN WILBUR WARD,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a Corpora-
tion,

Defendant.

Action for Damages for Negligence.

EDWARD E. COTHRAN,
Attorney for Plaintiff, Russ Building, San Fran-
cisco, Cal.

Complaint.

John Wilbur Ward, the above-named plaintiff, complains of the Southern Pacific Company, a corporation, the above-named defendant, and for cause of action against said defendant alleges the following facts:

I.

That the plaintiff is a native of Kentucky and at all times herein mentioned he was and now is a resident and citizen of the State of Arkansas, in the United States of America.

II.

That on and prior to the 8th day of October, 1910, the [2*] plaintiff was First Lieutenant of the Thirtieth Infantry of the United States Army, commanding Company "M" of said Thirtieth Infan-

*Page-number appearing at foot of page of original certified Record.

try, and also in charge of the Post Exchange of said Thirtieth Infantry at Atascadero, in the county of San Luis Obispo, State of California, and eligible to all the rights, salaries, emoluments and promotions in rank and honors appertaining and belonging to such army officer of First Lieutenant, and was of the age of thirty-five years.

III.

That at all times herein mentioned the defendant, Southern Pacific Company, was, and still is a railroad corporation, duly created, organized and existing under and by virtue of the laws of State of Kentucky, and was and still is in the sole possession, control, management, maintenance and operation of a certain steam railroad in the State of California known as the Southern Pacific Railroad, together with the tracks, rolling stock, depots, stations, property and other appurtenances thereto belonging, and was, and still is a common carrier of passengers and freight thereupon for hire, by means of cars and locomotives propelled by steam between the cities of San Francisco and Los Angeles in said State of California and between the railway stations of Atascadero and Paso Robles, in the county of San Luis Obispo, in said State, and within the Southern District of California.

IV.

That on the 8th day of October, 1910, the defendant, in consideration of the sum of fifty cents, then paid to defendant [3] by the plaintiff therefor, at said station of Atascadero, undertook and agreed on said day, as such common carrier, to transport

and convey the plaintiff as a passenger upon said railroad from said Atascadero to said Paso Robles and to transport and convey plaintiff as such passenger from said Paso Robles to said Atascadero, and in evidence of such agreement, the defendant, at said station of Atascadero, then delivered to plaintiff its ticket to said Paso Robles and return ticket to said Atascadero.

V.

That defendant, on said day, did in fact, transport and convey plaintiff as such passenger from said Atascadero to said Paso Robles.

VI.

That during the evening of said day, at forty minutes past ten o'clock, or thereabout, a passenger train of defendant, consisting of a number of cars and a steam locomotive, known as the Sunset Express, was due to arrive at said station of Paso Robles, southbound, for said station of Atascadero and other points upon defendant's said railroad, southerly from said Paso Robles.

VII.

That long before and at the time of the arrival of said train at said station of Paso Robles, on the evening of the 8th day of October, 1910, the defendant well knew and fully understood that there was present a large crowd, to wit, about five hundred [4] persons, waiting at said station of Paso Robles for the purpose of taking passage upon said train and that said defendant could accommodate only a small number of said crowd with transportation upon said train, and defendant then well knew that

it had negligently failed in preparation to accommodate said crowd, and that there would be a general movement and surging of said crowd to obtain and secure the said accommodation that then existed upon said train when said train approached said station of Paso Robles, and that it would be extremely dangerous to approach said station of Paso Robles with said train, except at a rate of speed whereby said train was under perfect and instant control; and defendant then well knew that it had neglected and failed to employ any means to maintain order in said crowd. That on the evening of the 8th day of October, 1910, at about eleven o'clock thereof, and while said crowd described aforesaid was in fact waiting at said station of Paso Robles for the purpose aforesaid, and while said defendant could in fact accommodate only a small number of said crowd with transportation, and while said defendant negligently failed in preparation to accommodate said crowd and while said crowd immediately upon catching sight of said train was moving and surging to obtain and secure the small accommodation that then existed upon said train, and while defendant neglected and failed to take any action for the purpose of maintaining order in said crowd upon its premises at said station of Paso Robles, said defendant, with such knowledge aforesaid, carelessly, negligently and recklessly ran its said train into said station of Paso Robles at a rapid and dangerous rate of speed, to wit, at about twenty miles per hour; that at said last mentioned time and while part of said train was opposite said station of Paso

Robles and moving at said rapid and dangerous rate of [5] speed, and while plaintiff was standing at a reasonable distance from the tracks of said defendant at defendant's said station of Paso Robles, waiting with his said passenger ticket in his possession to take said train for said Atascadero, the plaintiff, by said movement and surging of said crowd and by reason of the negligences aforesaid of the defendant, was jostled to and against said moving train, and said plaintiff, by reason of said rapid and dangerous rate of speed of said train, was unable to free himself from said contact with said train, and was irresistibly carried along and forced to move by the side of said train, and thereupon said train, moving at the rate of speed aforesaid, threw plaintiff with great violence and force upon the track of defendant's said railroad, and before plaintiff could extricate himself from his said position upon said track, the wheels of defendant's said train of cars ran over and crushed the right leg of plaintiff.

VIII.

That said injury to plaintiff, caused as aforesaid, necessitated the surgical amputation of plaintiff's said right leg at the knee, and plaintiff's said right leg was, on or about said 8th day of October, 1910, amputated at the knee by surgeons. That by reason of said injury, plaintiff has suffered and will continue for a long time to suffer great pain and mental anguish.

IX.

That at the time said injury was inflicted upon

plaintiff [6] as aforesaid, he was in perfect health, physically unimpaired, and possessed a robust constitution, and was able to perform and was in fact performing all his duties and labors as such officer.

X.

That said injury is permanent in its character, and by reason thereof plaintiff will be unable, the rest of his life, to support or maintain himself in his said profession of arms or to earn and enjoy promotion in rank and honor, or receive any increase in salary in said profession. That by reason of said injury plaintiff has been unable to perform any labor whatsoever, and will be incapacitated the remainder of his life from performing any labor in his said profession of arms.

XI.

That by reason of said injury, plaintiff is now and has been compelled to remain in a hospital ever since said date thereof, paying for accommodations at said hospital the sum of One Dollar per day, which sum was and is the reasonable value thereof.

XII.

That by reason of said injury, the plaintiff will be permanently retired from the said army and will utterly lose the career which he has chosen in life, together with all the rights, salaries, emoluments, and promotion in rank and honor to which plaintiff was eligible prior to said injury. [7]

XIII.

That at the time said injury was inflicted upon plaintiff, as aforesaid, plaintiff for his services as

said army officer, of First Lieutenant, earned and received from the Government of the United States an annual salary of Two Thousand Four Hundred (\$2,400.00) Dollars.

XIV.

That by reason of the premises, plaintiff has sustained damages in the sum of One Hundred Thousand (\$100,000.00) Dollars.

WHEREFORE plaintiff demands judgment against said defendant for the sum of One Hundred Thousand (\$100,000.00) Dollars and costs of suit.

EDWARD E. COTHRAN,

Attorney for Plaintiff. [8]

United States of America,
District of Columbia,
City of Washington,—ss.

John Wilbur Ward, being first duly sworn, says that he is the plaintiff in the above-entitled action, that he has read the foregoing Complaint and knows the contents thereof and that the same is true of his own knowledge.

(Signed) JOHN WILBUR WARD.

Subscribed and sworn to before me this 21st day of August, 1911.

[Notarial Seal] JAMES R. STAFFORD,
Notary Public, D. C.

My Commission expires Apr. 29, 1913.

[Endorsed]: No. 1,664—Southern Division. In the Circuit Court of the United States, Ninth Circuit, Southern District of California. John Wilbur Ward, Plaintiff, vs. Southern Pacific Company, a Corporation, Defendant. Complaint. Action for

Damages for Negligence. Filed Sep. 5, 1911. Wm. M. Van Dyke, Clerk. By John T. Goolrick, Jr., Deputy Clerk. Edward E. Cothran, Attorney for Plaintiff, Russ Building, San Francisco, California.
[9]

[Summons.]

UNITED STATES OF AMERICA.

*Circuit Court of the United States, Ninth Circuit,
Southern District of California, Southern
Division.*

#1664.

JOHN WILBUR WARD,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a Corpora-
tion,

Defendant.

Action brought in the said Circuit Court, and the
Complaint filed in the office of the Clerk of said
Circuit Court, in the City of Los Angeles,
County of Los Angeles.

The President of the United States, Greeting: To
Southern Pacific Company, a Corporation:

You are hereby required to appear in an action
brought against you by the above-named plaintiff, in
the Circuit Court of the United States, Ninth Cir-
cuit, in and for the Southern District of California,
Southern Division, and to file your plea, answer or
demurrer, to the complaint filed therein (a certified

copy of which accompanies this summons), in the office of the Clerk of said Court in the City of Los Angeles, County of Los Angeles, within twenty days after the service on you of this summons, or judgment by default will be taken against you.

The said action is brought to recover the sum of \$100,000.00, as damages for personal injuries to said plaintiff, caused, as plaintiff alleges, by the negligence and want of care on the part of said defendant, and not by any fault or negligence on the part of the plaintiff; plaintiff further prays judgment for costs of suit; all of which more fully appears from the complaint on file in this cause, to which you are hereby expressly referred, and if you fail to appear and plead, answer or demur, as herein required your default will be entered and the plaintiff will apply to the Court for the relief demanded in the complaint.

WITNESS, the Honorable EDWARD D. WHITE, Chief Justice of the United States, this 5th day of September, in the year of our [10] Lord one thousand nine hundred and eleven and of our Independence the one hundred and thirty-sixth.

[Seal]

WM. M. VAN DYKE,

Clerk.

By John T. Goolrick, Jr.,

Deputy Clerk.

[Endorsed]:

United States Marshal's Office,
Northern District of California.

I hereby certify that I received the hereunto annexed Summons on the 7th day of September, 1911,

and personally served the same on the 7th day of September, 1911, upon the Southern Pacific Company, a corporation, the defendant herein named, by handing to and leaving with F. H. Reed, who is the person designated by the defendant under the Statutes of the State of California as the person upon whom all legal process shall be served in matters affecting the Southern Pacific Company, a corporation, in the State of California, a certified copy of the annexed Summons, together with a certified copy of the complaint attached thereto, certified to by the Clerk of the Circuit Court for the Southern District of California, at Los Angeles, in the State and Southern District of California. Service of this writ made on the above-named defendant in the City and County of San Francisco, Cal., in said District, on the 7th day of September, 1911.

Dated at San Francisco, California, this 11th day of September, 1911.

C. T. ELLIOTT,

U. S. Marshal.

By M. J. Fitzgerald,

Office Deputy. [11]

[Endorsed]: Marshal's Docket No. 5,957, No. 1,664, U. S. Circuit Court, Ninth Circuit, Southern District of California, Southern Division. John Wilbur Ward vs. Southern Pacific Company, a Corporation. Summons. Edward E. Cothran, Plaintiff's Attorney. Filed Sep. 12, 1911. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. [12]

*In the Circuit Court of the United States, in and for
the Ninth Circuit, for the Southern District of
California, Southern Division.*

JOHN WILBUR WARD,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a Corpora-
tion,

Defendant.

Demurrer to Complaint.

Comes now the defendant Southern Pacific Company, a corporation, by its attorney, and demurs to the complaint in the above-entitled action and for cause of demurrer says:

I.

That the said complaint does not state facts sufficient to constitute a cause of action against the said defendant.

II.

And further specially demurring the said defendant says, that the said complaint is uncertain in that it does not therein appear, nor can it be ascertained therefrom whether the Sunset Express referred to in paragraph VI of said complaint was a train then due to stop at the said station of Paso Robles, nor is it therein alleged, nor can it be ascertained therefrom, whether the said ticket, so alleged to have been purchased by said plaintiff, entitled said plaintiff to a ride or passage on said Sunset Express.

III.

That the said complaint is uncertain in this, that

it cannot be ascertained from said complaint in paragraph VII therein, or otherwise, how long before, a large, or any crowd, was at the said station of Paso Robles, or how long before the arrival of said train the defendant knew, or could have known [13] or understood, that such or any crowd was to be present thereat.

IV.

That the said complaint is uncertain in this, that it does not therein appear, nor can it be ascertained therefrom, how, or why it was, or is, material to this cause of action why it should be extremely dangerous or dangerous in any wise, to approach said station of Paso Robles with said train, except at a rate of speed whereby said train "was under perfect and instant control," and that it does not appear in said complaint why it was necessary that said train should have been under perfect and instant control. And it is also uncertain in that it does not therein appear whether or not the said train was in fact under perfect and instant control, or perfect or instant control.

V.

That the said complaint is uncertain in this, that it does not appear therein, nor can it be ascertained therefrom, how the said crowd of persons or any thereof could have known of the amount of accommodation that then existed upon said train, or whether the same was small or otherwise, and why the said crowd should have moved or surged to obtain or secure the same.

VI.

That said complaint is uncertain in this, that it does not appear therein, nor can it be ascertained therefrom, how far or how near to the tracks of said defendant the said plaintiff was standing at the time when said train reached said station. [14]

VII.

That the said complaint is ambiguous for all the reasons that and in all the particulars in which it is alleged to be uncertain in paragraphs 2, 3, 4, 5, and 6, hereinabove.

VIII.

That the complaint is unintelligible for all the reasons that and in all the particulars in which the said complaint is alleged to be uncertain in paragraphs 2, 3, 4, 5 and 6 hereinabove.

WHEREFORE, defendant prays that its said demurrer be sustained and that plaintiff take nothing by his said action, and that defendant have judgment for its costs.

J. W. McKINLEY,

Attorney for Defendant. [15]

State of California,
County of Los Angeles,—ss.

Samuel Marks, being first duly sworn, deposes and says: That he is a clerk in the office of J. W. McKinley, Esq., an attorney at law, with offices in the City of Los Angeles, State of California; that said J. W. McKinley, Esq., is the attorney of record for the defendant in the foregoing entitled action; that Edward E. Cothran, according to affiant's information and belief is an attorney at law, with offices in

the Russ Bldg., city of San Francisco, California, and the attorney of record for plaintiff in the foregoing entitled action; that there is a U. S. Postoffice in each of said two cities, and a daily communication between said two cities by mail; that deponent did on the 27th day of September, 1911, serve defendant's notice of motion to strike upon attorney for plaintiff, by depositing in the U. S. Postoffice at Los Angeles, California, a true copy thereof, in an envelope addressed to said Edward E. Cothran, Attorney at Law, Russ Bldg., San Francisco, Cal., and prepaying the postage thereon.

SAMUEL MARKS.

Subscribed and sworn to before me this 27th day of September, 1911.

[Seal]

NAT. B. BROWNE,

Notary Public in and for the County of Los Angeles,
State of California.

[Endorsed]: #1,664. United States Circuit Court, Southern District of California, Southern Division. John Wilbur Ward, Plaintiff, vs. Southern Pacific Co., Defendant. Demurrer to Complaint. Filed Sep. 27, 1911. Wm. M. Van Dyke, Clerk. By John T. Goolrick, Jr., Deputy Clerk. J. W. McKinley, 434 Pacific Electric Bldg., Cor. 6th & Main Sts., Los Angeles, Cal., Attorney for Defendant. [16]

**[Order Overruling Demurrer to Complaint for
Amendment of Complaint, etc.]**

At a stated term, to wit, the July term, A. D. 1911, of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Southern District of California, Southern Division, held at the courtroom, in the city of Los Angeles, on Monday, the ninth day of October, in the year of our Lord one thousand nine hundred and eleven: Present: The Honorable OLIN WELLBORN, District Judge.

No. 1,664.

JOHN WILBUR WARD,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY,

Defendant.

This cause coming on this day to be heard on defendant's motion to strike from the complaint certain portions thereof, and also to be heard on defendant's demurrer to plaintiff's complaint, Edward E. Cothran, Esq., appearing as counsel for plaintiff, and Samuel V. McClure, Esq., appearing on behalf of defendant's counsel, and said motion having been argued by counsel for the respective parties, and counsel for plaintiff having consented that the words "and a married man" upon page 2, at line 8, of said complaint be struck out, and said motion to strike out in other respects having been denied, and said demur-

rer having been argued by counsel for the respective parties, and submitted to the Court for its consideration and decision, it is now by the Court ordered, that said demurrer be, and the same hereby is, overruled; it is further ordered that the original complaint on file be amended by striking out said words "and a married man" on page 2, at line 8 thereof, said amendment to be made by the clerk and to be attested by him with a reference to this order; it is further ordered that defendant have twenty days in which to answer plaintiff's complaint; notice of the ruling of the Court on said motion and on said demurrer is waived by counsel for both parties in open court. [17]

[Endorsed]: C. C. No. 1,664. United States District Court, Southern District of California, Southern Division. John Wilbur Ward, Plaintiff, vs. Southern Pacific Company, Defendant. Copy of Order. Filed Nov. 16, 1912. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. [18]

ORIGINAL.

*In the Circuit Court of the United States, in and for
the Ninth Circuit, Southern District of California,
Southern Division.*

JOHN WILBUR WARD,

Complainant,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,
tion,

Defendant.

Answer.

Now comes defendant and denies that long before or for any considerable time before, or for more than a few minutes before the arrival of the passenger train of defendant mentioned in paragraph VI of plaintiff's complaint, on the evening of the eighth of October, 1910, the defendant well knew or knew or fully understood that there was present a large crowd or any crowd of five hundred persons, or any considerable number of persons, or any number of persons in excess of two hundred, waiting at the station of Paso Robles, for the purpose of taking passage upon said train, or knew that defendant could accommodate only a small number of said crowd with transportation upon said train, or that defendant well knew or knew at all that it negligently failed in preparation to accommodate said crowd, or that there would be a general movement or surging of said crowd to obtain or secure said accommodation that existed upon said train when said train approached the station at Paso Robles, or knew any of said matters for any length of time sufficient to enable defendant to make any preparation to take care of or accommodate said crowd, or knew that when said train approached the station of Paso Robles it would be extremely dangerous or dangerous at all to approach said station of Paso Robles with [19] said train at any rate of speed whatever. Denies that defendant in fact could accommodate only a small number of said crowd with transportation, and alleges that defendant could

accommodate on said train several hundred persons with transportation from Paso Robles to Atascadero. Denies that defendant negligently failed in preparation to accommodate said crowd or failed in preparation to accommodate said crowd. Denies that defendant with any knowledge of any sort or at all carelessly, negligently or recklessly ran its train into said station of Paso Robles at a rapid or dangerous rate of speed, or at about twenty miles per hour, or any speed exceeding five miles per hour, or that said train opposite to the station of Paso Robles was moving at a rapid or dangerous rate of speed, or that plaintiff was standing at a reasonable distance from the train of defendant at defendant's station to take said train for Atascadero. Denies that plaintiff by any negligence of defendant was jostled to or against said moving train, or that by reason of any rapid or dangerous rate of speed of said train was unable to free himself from contact with said train or was irresistibly carried along or forced to move by the side of said train; denies that the said train, moving at the rate of speed mentioned in complainant's complaint or any rate in excess of five miles per hour, threw plaintiff with great violence or force, or at all, upon defendant's railroad.

II.

Defendant, according to its information and belief, alleges that the plaintiff was fully informed of all of the conditions existing at said station and in approaching said train placed himself in a position between said crowd and said train, and by the jostling of said crowd before said train was stopped was

pushed and shoved under said train by said crowd without any fault of defendant of any sort or kind whatsoever. [20]

III.

Defendant, according to its information and belief, alleges that a large portion of said crowd were soldiers of the regular army of the United States, and that said plaintiff, by virtue of his rank as an officer of the United States army, had full authority to command said soldiers of the United States to restore order, and had power to quell all of the disorders set forth in plaintiff's complaint, and that it was his duty to do so, but the plaintiff wholly failed and neglected to perform said duty, and by reason of said disorder suffered the injuries set forth in his complaint.

IV.

Defendant, according to information and belief, denies that plaintiff sustained damages in the sum of \$100,000, or in any sum of money whatsoever, or at all.

AND FOR ANOTHER AND SEPARATE DEFENSE, defendant alleges that whatever injuries were suffered by said plaintiff were proximately caused by his own negligence.

AND FOR ANOTHER AND SEPARATE DEFENSE, defendant alleges that the negligence of said plaintiff proximately contributed to cause the accident and injuries mentioned in plaintiff's complaint.

WHEREFORE, defendant prays that this action

be dismissed and that it have and recover its costs herein expended.

J. W. McKINLEY,
Attorney for Defendant. [21]

State of California,
City and County of
San Francisco,—ss.

W. F. Ingram, being duly sworn, deposes and says: That he is an officer of the defendant corporation, Southern Pacific Company, to wit: Assistant Secretary thereof; that he has read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated on information and belief, and that as to those matters he believes it to be true. That he makes this verification as such officer.

W. F. INGRAM.

Subscribed and sworn to before me this 26th day of October, 1911.

[Seal] E. B. RYAN,
Notary Public in and for the City and County of San
Francisco, State of California.

[Endorsed]: Service by copy of the within answer is hereby admitted this 26th day of October, 1911.

EDWARD E. COTHRAN,
Attorney for Plaintiff.

Original. No. 1664. United States Circuit Court, Southern District of California, Southern Division. John Wilbur Ward, Plaintiff, vs. So. Pac. Co., Defendant. Answer. Filed Oct. 27, 1911. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy

Clerk. J. W. McKinley, 434 Pacific Electric Bldg.,
Cor. 6th & Main Sts., Los Angeles, Cal., Attorney for
Defendant. [22]

[Verdict.]

*In the District Court of the United States, for the
Southern District of California, Southern Di-
vision.*

C. C. No. 1664.

JOHN WILBUR WARD,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY,

Defendant.

We, the jury in the above-entitled cause, find in
favor of the plaintiff, in the sum of \$15,500.00.

Los Angeles, November, 1912.

JACOB SCHNEIDER,

Foreman.

[Endorsed]: C. C. 1664. U. S. District Court,
Southern District of California, Southern Division.
John Wilbur Ward vs. Southern Pacific Co. Ver-
dict. Filed November 15, 1912. Wm. M. Van Dyke,
Clerk. By C. E. Scott, Deputy Clerk. [23]

[Judgment.]

UNITED STATES OF AMERICA.

District Court of the United States, Southern District of California, Southern Division.

C. C. No. 1664.

JOHN WILBUR WARD,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY,

Defendant.

This cause having come on regularly for trial on the 12th day of November, 1912, being a day in the July Term, A. D. 1912, of the District Court of the United States for the Southern District of California, Southern Division, before the Court and a jury of twelve (12) men duly impanelled; Edward E. Cothran, Esq., appearing as counsel for plaintiff, and Robert C. Gortner, Esq., appearing as counsel for defendant; and the trial having been proceeded with on the 12th, 13th and 14th days of November, 1912, and witnesses having been sworn and examined and the evidence having been closed, and the cause, after argument by counsel for the respective parties, and the instructions of the Court, having, on said 14th day of November, 1912, been submitted to the jury, and the jury on the 15th day of November, 1912, having rendered the following verdict:

“In the District Court of the United States for the Southern District of California, Southern Division.

C. C. No. 1664.

JOHN WILBUR WARD,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY,

Defendant.

We, the jury in the above-entitled cause, find in favor of the plaintiff, in the sum of \$15,500.00.

Los Angeles, November, 1912.

JACOB M. SCHNEIDER,

Foreman.”

—and the Court having ordered that judgment be entered herein in accordance with said verdict in favor of the plaintiff and [24] against the defendant in the sum of Fifteen Thousand Five Hundred Dollars (\$15,500.00);

NOW, THEREFORE, by virtue of the law and by reason of the premises aforesaid, it is considered by the Court that John Wilbur Ward, plaintiff herein, have and recover of and from the Southern Pacific Company, defendant herein the sum of Fifteen Thousand Five Hundred Dollars (\$15,500.00), together with his said plaintiff's costs and disburse-

ments in this behalf taxed at \$333.40.

JUDGMENT entered November 16th, 1912.

WM. M. VAN DYKE,
Clerk.

By C. E. Scott,
Deputy Clerk.

[Endorsed]: C. C. No. 1664. United States District Court, Southern District of California, Southern Division. John Wilbur Ward, Plaintiff, vs. Southern Pacific Company, Defendant. Copy of Judgment. Filed Nov. 16, 1912. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk.
[25]

[Certificate to Judgment-roll.]

*In the District Court of the United States, for the
Southern District of California, Southern Division.*

C. C. No. 1664.

JOHN WILBUR WARD,
Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY,
Defendant.

I, WM. M. VAN DYKE, Clerk of the District Court of the United States, for the Southern District of California, do hereby certify the foregoing to be a true copy of the Judgment entered in the above-entitled action, and recorded in Judgment Book 2 of said court for the Southern Division, at page 177

thereof, and I further certify that the foregoing papers hereto annexed constitute the JUDGMENT-ROLL in said action.

ATTEST my hand and the seal of said District Court, this 16th day of November, A. D. 1912.

[Seal]

WM. M. VAN DYKE,

Clerk.

By Chas. N. Williams,

Deputy Clerk.

[Endorsed]: C. C. No. 1664. In the District Court of the United States for the Southern District of California, Southern Division. John Wilbur Ward vs. Southern Pacific Company. Judgment-roll. Filed November 16th, 1912. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Recorded Judgment Register Book No. 2, page 177.
[26]

In the District Court of the United States, Southern District of California, Southern Division.

No. 1664—Civil.

JOHN WILBUR WARD,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY,

Defendant.

Bill of Exceptions.

Trial—November 12, 13, 14, 1912.

BE IT REMEMBERED, that on the 12th, 13th and 14th days of November, A. D. 1912, the above-

entitled cause came on for trial before the above court and a jury, duly impaneled, Honorable Frank H. Rudkin, presiding.

The plaintiff appeared by E. E. Cothran, Esq., his counsel, and the defendant by Messrs. J. W. McKinley and R. C. Gortner, its counsel, and the following proceedings were had:

An opening statement to the jury was made by E. E. Cothran, Esq., for the plaintiff, and the opening statement for the defendant was, by permission of the Court, reserved until after the introduction of the plaintiff's testimony. [27]

Testimony of M. H. Highland, for Plaintiff.

M. H. HIGHLAND, a witness produced on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct Examination.

(By Mr. COTHRAN.)

My name is M. H. Highland; was Superior Judge in this State for Santa Clara county for twelve years. Captain Ward, here, is my brother in law. I know this diagram shown me to be accurate; it represents the station of Paso Robles, and was taken this last September.

This building is part of the freight warehouse that is used for a ticket office and waiting-room; this is a freight warehouse; this along here is a platform, raised up about five steps. Surrounding here there is not a platform, and was not in October, 1910; it was level; up to these posts, which are iron posts, it is ground. This side of the iron posts it is either

(Testimony of M. H. Highland.)

cement or asphaltum. These are two tracks called the switch tracks. Between that is an asphaltum space, and then the main track. Outside of the building proper here it is all level, with the exception of this platform. The platform has an elevation of about four feet, I should judge.

Mr. COTHRAN.—We will admit that upon the part of the plaintiff; we don't claim that those cars, those passenger coach cars marked there, represent in any respect the position of the train on that night. I will make this [28] further statement, that whatever cars were there, we will offer evidence to prove, and that we will not contend that the position of any of these cars has anything to do with the map, except that we offer evidence to sustain the map. [29]

Cross-examination.

(By Mr. GORTNER.)

This platform that I speak of which is platted here adjoining the diagram marked "Freight warehouse," is a freight platform for the loading and unloading of freight-cars, and not a passenger platform for the accommodation of passengers; and the ground from the main track towards the west is all level for two or three hundred feet there, and practically unoccupied by any obstruction whatever, up to that lumber yard or shed on the north, between these two spaces. The distance between the freight warehouse and the lumber-shed, I think would measure about two hundred feet. It will show there on the map. The tracks are also about on a level with the ground;

(Testimony of M. J. Highland.)

and the tracks are themselves apparently level to the eye.

Mr. COTHRAN.—We will offer this in evidence as Plaintiff's Exhibit Number 1.

Testimony of H. B. Light, for Plaintiff.

H. B. LIGHT, a witness produced on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct Examination.

(By Mr. COTHRAN.)

I have resided in Los Angeles thirteen or fourteen years; am captain of Company "B," Seventh Infantry of the National Guard, and have been such for three years and a half. [30] In that capacity I attended the joint maneuvers at Atascadero, in September and October, 1910. These were military joint maneuvering between the National Guard and the regular army, for the purpose of instruction of the officers and men, both of the regular army and National Guard.

Q. About how many men were there, including officers?

Mr. GORTNER.—That is objected to as immaterial and irrelevant.

Said objection was overruled by the Court; whereupon the defendant, by its counsel, then and there duly excepted.

Exception Number One.

A. I should say about ten thousand. In that neighborhood. They consisted of soldiers and officers mostly.

(Testimony of H. B. Light.)

I have seen this document, marked "Plaintiff's Exhibit 3," before. It is a schedule that was gotten out by the railroad companies at the time, for the purpose of showing the camping grounds.

Mr. GORTNER.—That is objected to as a conclusion of the witness. The paper speaks for itself, if it is admitted in evidence.

Said objection was overruled by the Court; to which ruling of the Court, the defendant, by its counsel, then and there duly excepted.

Exception Number Two.

I first saw this paper, "Plaintiff's Exhibit 3," marked on the outside "U. S. Army Maneuvers, Camp Atascadero, near Paso Robles Hot Springs, California, October 10, Southern Pacific," when five of those were sent to me for Company "B," containing a map and a special schedule between Atascadero [31] and Paso Robles, the rate of fare, and the nature of the tickets that would be issued during the months of September and October.

All of which was objected to by counsel for defendant on the ground that the paper was the best evidence, and that if introduced it would speak for its contents.

Said objection was overruled by the Court, to which ruling the defendant, by its counsel, then and there duly excepted.

Exception Number Three.

The said paper was thereupon offered in evidence as Plaintiff's Exhibit 3.

(Testimony of H. B. Light.)

The same was objected to by counsel for defendant as unnecessarily encumbering the record, and immaterial and irrelevant; which objection was overruled by the Court; to which ruling of the Court defendant, by its counsel then and there duly excepted.

Exception Number Four.

The said paper was thereupon received in evidence as Plaintiff's Exhibit 3, and was a folder advertising the said army maneuvers at camp Atascadero; advertising Paso Robles Hot Springs, and containing the following schedule of trains between Atascadero and Paso Robles, to wit: [32]

[Plaintiff's Exhibit No. 3.]

TRAIN SERVICE.

Said Train Service will be inaugurated between Paso Robles and Atascadero from October 1st to 15th as shown below. In addition to this special service all trains, except The Lark (Nos. 76-75) will stop at Atascadero.

SCHEDULE OF SPECIAL AND REGULAR TRAIN SERVICE BETWEEN PASO ROBLES HOT SPRINGS AND ATASCA- DERO.

October 1 to 15 inc. 1910.

Daily	Lv Paso Robles Hot Springs	Lv Templeton	Lv Ascencion	Ar Atascadero
No. 18	3 47 A M	4 00 A M	.....	4 18 A M
Special	7 30 A M	7 44 A M	7 50 A M	7 55 A M
Special	10 00 P M	10 14 A M	10 20 A M	10 25 A M
No. 22	2 10 P M	2 20 P M	.....	2 32 P M
Special	3 30 P M	3 40 P M	3 56 P M	4 05 P M

(Testimony of H. B. Light.)

Daily	Lv Paso Robles Hot Springs	Lv Templeton	Lv Ascencion	Ar Atascadero
No. 24	4 49 P M	4 48 P M	4 45 P M	5 03 P M
No. 10	10 46 P M	.....	.....	11 10 P M
No. 20	11 16 P M	.....	.....	f 1 33 P M

Daily	Lv Atascadero	Lv Ascencion	Lv Templeton	Ar Paso Robles Hot Springs.
No. 17	12 44 A M	.....	12 57 A M	1 11 A M
No. 9	4 04 A M	.....	.....	4 26 A M
No. 23	8 03 A M	8 08 A M	8 14 A M	8 30 A M
Special	9 15 A M	9 20 A M	9 26 A M	9 40 A M
Special	12 35 P M	12 40 P M	12 46 P M	1 00 P M
No. 21	5 03 P M	.....	5 13 P M	5 25 P M
Special	6 30 P M	6 35 P M	6 41 P M	6 55 P M
No. 19	f 3 52 P M	.....	.....	4 10 P M

[33]

The WITNESS.—I have also seen this paper, marked “On The Firing Line, U. S. Army Manuevers, Camp Atascadero, California, near Paso Robles Hot Springs, September—October, 1910.” That was circulated there. There were five copies of those posters sent me at the same time the pamphlet there was sent, with a request to post it in a conspicuous place in the army.

The same was thereupon offered in evidence as Plaintiff’s Exhibit 4 by plaintiff.

To which defendant, by its counsel, objected on the ground that the same was incompetent, irrelevant and immaterial.

Said objection was overruled by the Court, and said document was admitted in evidence as Plaintiff’s

(Testimony of H. B. Light.)

Exhibit 4; to which ruling of the Court defendant, by its counsel, then and there duly excepted.

Exception Number Five.

The said Plaintiff's Exhibit 4 was in words and figures as follows, to wit: [34]

[Plaintiff's Exhibit No. 4.]

ON THE FIRING LINE

U. S. ARMY

MANEUVERS

CAMP ATASCADERO

California.

NEAR

PASO ROBLES

Cut

SEPT.

HOT

in Colors.

OCT.

SPRINGS

1910.

FOR FULL INFORMATION RELATIVE

SPECIAL RATES AND SERVICE

SECURE CAMP ATASCADERO FOLDER FROM ANY AGENT

SOUTHERN PACIFIC.

[35]

The WITNESS.—On the 7th day of October, 1910, I was at Atascadero, at the camp; on the morning of October 8, 1910, I was there at Camp Atascadero; remained in camp until about a quarter after five and then I went into Paso Robles, by train, railroad, I procured a ticket. This ticket shown me, marked "Southern Pacific Company, 2 day excursion Ticket Paso Robles to Atascadero and return," stamped on the back, "Southern Pacific, October 8, 1910, Atascadero," is practically the same as I secured myself, one of the same. It cost fifty or sixty cents; I think

(Testimony of H. B. Light.)

it was sixty. I didn't buy this particular ticket.

I left Atascadero for Paso Robles on the 8th day of October, somewhere about seven o'clock in the evening; remained until the ten o'clock train was supposed to come back, at ten o'clock, returning. It was scheduled, I think, to leave about ten. I am not positive about the exact time; that is my impression. They were having some sports of different natures at Paso Robles, swimming contests, band concerts and swimming races.

I know Captain Ward, the plaintiff, John Wilbur Ward. I met him, the first time I ever met him was the night of the accident, the 8th day of October. I was not acquainted with him at that time. On the 8th of October, 1910, I first saw him at the station at Paso Robles; he was leaning over his leg. He had been run over by the train and was leaning over his leg, protecting it. Before that I saw him standing about twelve feet ahead of me, he and another officer, talking. That other officer was Lieutenant Anderson, [36] I understand.

It was about five minutes to ten, I believe, when we got down to the station. We remained there until the train came in. The train arrived about twelve minutes after ten, I think, something like that; I should have said eleven. The train was due there something like ten-fifty, and was about twelve or fifteen minutes late. There was around that station at Paso Robles, when I arrived there about six or seven hundred men; more came down afterwards. Before the train came in, there were between nine hundred

(Testimony of H. B. Light.)

and a thousand men there. There may have been one or two stragglers arrived there just at the time the train came in or immediately afterwards, but practically all of them were there before the train came in.

There was a car there that night alongside of the freight depot, near that platform. I recall distinctly that that car was there that night. The freight-car was standing by that freight platform that night. I don't think it is more than two feet across here on those steps of the platform, of the office, to the track. I should judge about two feet from the edge of the platform to the side of the car.

When I first saw Captain Ward, as nearly as I can figure it from the map there, he was standing about a hundred feet down from here. When I first came in from town I came down on Ninth Street—either Ninth or Eighth street—I am inclined to think it was Ninth Street, and came over here, started right at this light here. There [37] was a light here at that time and Lieutenant Barnett and myself stepped under this light, and there were two or three men from my camp and we talked to them a minute or two, and there was another captain with us, and I found out the train was late.

The light that I alluded to was the only light hung outside, except the station light that was swung from the ticket office. This was a single arc-light, on a pole, probably ten or twelve or fifteen feet from the ground. I know nothing about these red ones as indicated here.

(Testimony of H. B. Light.)

Captain Ward was standing about in here, I think (indicating), and I was standing about twelve feet back of him. It was about a hundred feet from the depot, from the end. (Indicating by circle on map.) Captain Ward was not the nearest one to the track. There were several hundred people in between him and the track, that is, scattered along. I should say there were probably twelve or fifteen people in between Captain Ward and the track at the time; directly in front, before the train came in; there were people all around there.

I have had quite a bit of experience in connection with engines or trains. I worked with engines, stationary [38] engines and fired in the roundhouse. That train came into the station that night at a speed of not less than twenty-five miles an hour. I think there were three Pullmans and five passenger-cars on that train; the baggage-car was at the head. There was nine cars, I think, altogether on the train, three Pullmans, and the balance of them were the passenger and baggage cars. There may have been four or five passenger-cars. I wouldn't say positively the exact number.

When that train came in, the first passenger-car stopped, when the train finally stopped, right up close to the office. The train was southbound. The northern end of the passenger coaches was right in here (indicating by marking "L" on map). That left four or five coaches on down here, including the baggage and mail car, tender and engine. The distance between here and the platform where the last

(Testimony of H. B. Light.)

coach was about the length of a car.

The train had speeded by with the exception of those Pullmans; they were vestibuled that night. The crowd all surged forward through here, down between this box-car that was on this track and the passenger coach, down through this space (indicating). It was about ten feet, I should judge, between the two.

I saw the accident happen to Captain Ward. I was standing about between ten and twelve feet to the rear of Captain Ward and the officer that he was talking to at the time the accident occurred. From the time that we saw the headlight, the train came on, as I say, at about twenty-five [39] miles an hour; didn't seem any more than the snap of your finger until the time it was passed us, and of course the crowd started to move along, and I saw someone fall ahead of me. By that time I had closed in a little closer to the crowd. And there were some people in between Captain Ward and the train, surging forward themselves to meet the train. The crowd was down there—the reason I will state why I moved from the first position, as a general rule, the baggage-car stops at the baggage end of the station or the waiting-room in there, and I moved down in order to be able to get on the train and to get a seat, along with Lieutenant Barnett, who was with me; and we took our position, standing, as I say, about ten or fifteen feet behind Captain Ward and the officer he was talking with. The men were waiting. There was between nine hundred and a thousand men there, I

(Testimony of H. B. Light.)

guess, in that neighborhood.

As the train came in, it looked as though it were not going to stop; but as soon as they started to apply the brakes the crowd began to surge forward and move along with the train, along to get down to where the coaches were they had to occupy. And I saw Captain Ward fall; it looked to me as though he went right over somebody's back or over his head, turned a somersault, and I immediately started toward him, and by the time I got through the crowd it practically slacked a little bit; some of them that had been close to him and saw him, and by the time I got there he had fished himself out from under the car and was leaning over his injured leg to protect it.

[40]

It was his right leg, I guess, that he was leaning over, and he was holding his arms over it to protect the leg from the masses that were passing him. They were crowding around; a lot of them didn't know that there was any accident occurred, and he was bending over the leg at the time. The crowd was very orderly before the train came in. There was absolutely no disorder at the station at all. After I saw the Captain in this position, he held his mind very well; he didn't lose consciousness, and he was trying to direct some of the men how to take care of him. They were going to lift him. I started to take hold of him myself by the shoulders, and tried to lift him out of the way, but somebody got a litter from the station, I believe, and brought it over, and there was a hospital corps man there that acted in his

(Testimony of H. B. Light.)

capacity of taking care of the Captain, and the Captain started to take his belt off to put around his leg to stop the bleeding, to keep the blood from going from his heart, and he couldn't get it entirely off, so this hospital corps man, I think it was, that took the belt from him and wrapped around his leg and placed him on the litter, and started down to the baggage-car. First we started to the waiting-room, and somebody suggested we better put him right on the train and take him right into the general hospital at Atascadero, and we started down through this narrow passage, and we had a hard time to make our way through there; it took quite a little time to do it, and we had to go past the baggage-car, or past this freight-car that was standing in that small space, and that is one of the reasons [41] that I remember so distinctly the fact of that car standing there, because we had to pass by this freight-car with the litter, and go down to the baggage-car that was on to the head of the train to put the Captain in there so we could carry him through.

The train paused there at Paso Robles about twenty-five minutes, and then it went on, and the Captain in the baggage-car. I got on the train.

Q. How did you get on the train?

Mr. GORTNER.—That is objected to as irrelevant and immaterial.

The COURT.—He can state what the conditions were of the train.

Defendant, by its counsel, duly excepted to the rul-

(Testimony of H. B. Light.)

ing of the Court.

Exception Number Six.

A. Before I got a position, got in a position where I could get on the train, or in the baggage-car, or these coaches, the train had started, and I ran—I got to the last, and got the last coach, and I ran along probably ten or twelve feet before I managed to get on the step after getting hold of the handles. I stood on that step possibly four or five minutes before I had an opportunity to wedge myself on the platform, and the men, of course, being an officer, they pressed aside and made as much room as they could, and pushed me through by the arms, and got me on my back and tried to pull me in, like you would on a crowded car. I stood on the platform, and it took me maybe probably ten [42] or fifteen minutes to get inside of the car.

The condition of the car was packed; there was not room for anybody to squeeze through from one end of the car to the other. There were men sitting on the sides of the seats, standing in between the people that had occupied the train before it arrived at Paso Robles, standing in back of them and in front of them.

Mr. GORTNER.—Move to strike it all out as irrelevant and immaterial.

Said motion was denied by the Court; to which ruling the defendant by its counsel, then and there duly excepted.

Exception Number Seven.

(Testimony of H. B. Light.)

Cross-examination.

(By Mr. GORTNER.)

I saw the Lieutenant, or Captain Ward when he fell. It is impossible to tell how far the train kept moving after he fell. The excitement of seeing the Captain fall and rushing over there, that is something I don't believe any sane man could answer. I couldn't state positively. The car that hit the Captain moved about four hundred feet, I guess, after he fell; when I saw the Captain fall, in about this position (indicating the point marked with a circle). I was standing back here. That circle with a dot in it is where he was standing when I saw him fall. In that neighborhood. I can't state positively whether he was a foot this way or a foot back, understand. Then, as the train came [43] along, I could not state as to which car hit him, or which car ran over him, what set of trucks it was that ran over him. That last coach stopped about in that position. I don't know how long those coaches are and therefore would be unable to state as to how many feet it went after it hit him.

When he fell, the fender of the engine and the baggage-car, I believe, had passed him. That is as definitely as I can give that honestly. I don't know whether he fell opposite the smoker or opposite one of the chair cars. I couldn't say as to that.

Q. Then, if he fell at the point you have indicated, about a hundred feet from the depot, the train, when it stopped, as you claim, had the rear day coach about opposite the end of the depot?

(Testimony of H. B. Light.)

A. Yes. Then the train, after he fell, would have moved at least a hundred feet, plus the number of cars that he fell opposite. I couldn't estimate it, not knowing. I should judge four hundred feet; that would be my judgment. I don't know the length of the cars or the train.

I saw him fall; was about ten or twelve feet of him. There were people between us; I could not state accurately whether anybody helped him out from under the car. The car did not stop before one set of trucks had entirely passed over his leg. I did not see anybody take hold of him, pull him out from under the car. I came down to the depot, from Eighth or Ninth street, I think it was Ninth street, and crossed somewhat diagonally. When I first came down, I came down that way, down to these lights. And then I walked back [44] down below to Captain Ward. I know Captain Ward, and Captain Ward and this other officer were standing there. I was about ten feet in the rear of Captain Ward when I first saw him. He was standing talking to this other officer about ten or twelve feet in front of me. When I first went down there, there was not as many people there as there was when the train came. There was anywhere between nine hundred and a thousand people at that depot when the train came in.

When I saw Captain Ward had been hurt, there was some part of the train opposite him as he lay on the ground—I don't know just the part—was close to him. The end of the train was somewheres near.

(Testimony of H. B. Light.)

I don't know how close. That train came into the station, to the best of my judgment, at the rate of twenty-five miles an hour. I mean it was running along the tracks at least at the rate of speed of twenty-five miles an hour. I don't say that the engine passed the baggage-room at that speed; I say the train came into the station. That is about, I should judge, seventeen hundred feet from there down to the track, down to the turn, to this curve here. When the engine passed me, it was going at least twenty-five miles an hour. I was about a hundred feet from the end of the depot; in here where the circle is.

I know better than that, after the Captain fell, the train didn't move more than ten feet. I am interested in this case in the way of justice. I have absolutely no interest in this case.

Prior to the time the train came in, it was the most orderly crowd I ever saw of a bunch of as many soldiers. [45] Nothing to give any indication to a railroad company or anyone else that there would be any disorder.

I don't know whether there were any cars along on this house-track along here. The only box-car I know of was the one we passed in taking the Captain to the baggage-car. I didn't notice anything about the Hotel Alexander auto bus. There were several vehicles there. I was standing about opposite the point marked "L" as the engine went by. I didn't see any soldiers jump out of that bus and start to board the steps of the train, nothing like that at all.

(Testimony of H. B. Light.)

I did not see anyone trying to board the steps of the train at the time that Captain Ward fell; didn't see anyone swinging on to the steps. I didn't see Captain Ward making for the steps there as it was moving.

The train hadn't stopped, but had kept moving until after Captain Ward was hurt. It hadn't made a stop and then started again; the train was in motion when he got hurt. He did not try to board it. I know, because there was people between him and he couldn't try it. There were people between him and the train. I did not see any of those people trying to board it. A man would have been a fool to try to board the train the rate it came in. I didn't see anyone within three or four or five feet, that was trying to board the train; didn't see any of the soldiers rush across from the direction of Eighth Street, where there is a saloon, just about the time the train was running in; saw nothing of that kind; didn't see any squad of soldiers make a rush for the train as it was going by. [46]

Testimony of William H. Anderson, for Plaintiff.

WILLIAM H. ANDERSON, produced as a witness on behalf of plaintiff, having been first duly sworn, testified as follows:

Direct Examination.

(By Mr. COTHRAN.)

I am second lieutenant, Thirtieth Infantry, United States Army; have been such since July 10, 1909. I am casually stationed at the Presidio, San Francisco.

(Testimony of William H. Anderson.)

My station is Fort Davis, Alaska. I have been in San Francisco casually, awaiting the directions of this Court, since April first.

I know Captain Ward, the plaintiff. I have known him practically all of my service as an officer of the United States Army, he being an officer of the regiment at the time that I entered. I joined the regiment September 11, 1909. I was commissioned June 10th, but I joined the regiment from graduation leave September 11, 1909. I have known him practically all the time. It was possibly a week or so before I finally met him,—after the time I joined before I finally met him.

In the months of September and October, 1910, I was at maneuver camp at Atascadero, California; there were between four and five thousand men there, including the National Guard, civilians, and so forth. That is not an official estimate. On the 8th day of October, 1910, I was at two places—at Atascadero in the morning and Paso Robles in the evening, after six o'clock. I went by train, Southern [47] Pacific train, from Atascadero to Paso Robles; had a round-trip ticket.

Q. You say it was an excursion ticket, was it?

Mr. GORTNER.—That is objected to as calling for a conclusion of the witness; incompetent, irrelevant and immaterial.

A. Yes, sir.

The COURT.—The answer may stand.

To which ruling of the Court the defendant, by its counsel, then and there duly excepted.

Exception Number Eight.

(Testimony of William H. Anderson.)

The WITNESS.—That is a ticket like the one I had. I left Atascadero, I think, in the afternoon, about four o'clock. Somewhere along there. It was before six o'clock.

I could only make my own estimate of how many soldiers there were at Paso Robles from Atascadero that day. I don't know exactly or approximately. I could only estimate from what I saw at the place when I got there. I should have said there were about seven or eight hundred, possibly.

I saw Captain Ward on the 8th of October, 1910. The first place that I saw him was in the swimming-tank; the hotel, Paso Robles Hotel, resort. The next time I saw him, I believe, at dinner-time; and then I saw him going to the station, at about ten or fifteen minutes after ten. I was with him for a little while; I talked to him there. We talked to some other officers. It was somewhere near the station. It was not inside the station, but I believe it was in a plot of ground that was right opposite the station, about a half hour before the train came in; did not see him [48] any more before the train came in. According to the schedule the train was due at 10:47 that night, I believe. I think it came in a little late; just a very few minutes; not over five minutes.

I should judge, from the time I was there and what I saw—I am judging only of those that were in front of me. I was standing back of the crowd to some extent; and judging from what I saw around waiting for the train, I should have said about four

(Testimony of William H. Anderson.)

or five hundred men were around there at the station at Paso Robles just before the train came in.

As the train drew in there was a certain number of men who were behind me moved forward to get on. People came from Paso Robles or from saloons or other places just before the train came in. In comparison with the crowd that was already there, I should have said it was not a very large number and was not a small number. It was quite a number of persons joined the crowd. I should not call it a disorderly crowd.

I should have said that the train came in, between twenty and twenty-five miles an hour. I was talking with another officer behind this crowd. I was careful myself, and for that reason there was such a crowd, I stayed back. And as the train came in, in remarking to him, I said, "That train is coming in pretty fast. It looks dangerous." I think the exact words I used was, "My God! See that train draw in." Those were the exact words I used at the time. It was an expression that just came out. The train seemed to come in fast to me. Of course, it may not have been [49] that fast but that is the way it looked to me. I should judge, by my knowledge of the speed of passing vehicles I should have said, between twenty and twenty-five.

I don't know where Captain Ward was at the time the train came; did not see him; didn't know what position he occupied in the crowd. I did not see the accident occur. I have no recollection of the number of cars on that train; have a recollection of there

(Testimony of William H. Anderson.)

being different kinds of cars upon the train. I have some memory of about the position the last day or night coach stopped, in reference to the station, examining this diagram which is here. I should have said it stopped somewhere near the end—I am not certain whether it was exactly, but it was somewhere in a line opposite this end of the station; a waiting-room there. This picture represents somewhat near my recollection. I am not absolutely certain, though, it was near that.

The Pullmans were in rear. I don't know how many, but there were freight-cars on this track next to the station, this first platform. To my recollection that train came in on this track, moving south. After the train came in, I became cognizant of an accident that had occurred to Captain Ward. As it turned out, I was practically in rear of him.

I moved up to see what could be done, and what, exactly, the trouble was. I was not absolutely certain what it was at first. I heard the cry someone was hurt, and I moved forward to investigate, and found it was Captain Ward. And the crowd was surging around him. Evidently quite a number didn't know that he was hurt at the time, and it seemed as [50] though he should be trampled under foot. And I tried to get the men back, but they were all so intent upon getting the train that they didn't seem to pay any attention to this, and didn't know of it. So I assumed command of the emptory to move back, which they did to an extent troops, of the military, there, and ordered them per-

(Testimony of William H. Anderson.)

sufficient that we could look out for him and have a litter brought up and have him put on the litter and removed to the baggage-car of the train.

When I first saw Captain Ward, he was sitting up in the—right off the concrete platform—I believe it was concrete—and practically under the train. He had evidently raised himself up to that position. He was sitting up; and seemed to be conscious, and trying to protect his injured leg by spreading his hands out like that.

There was quite a crowd around there, and they were intent upon getting a position in the train. There was not such a great number of them. And as the train drew in, on one end particularly, I noticed, one Pullman car was open; and I noticed quite a number of men surged toward that place. There was a porter, I believe, standing on the steps, when the Pullman was opened, and also a train official. I couldn't say he was a conductor or a brakeman, but there were two train officials standing on this platform. It was open—this Pullman car—I noticed this particularly, and men surged to it and tried to get in, and as the train drew in those who had caught hold of the bars leading up the steps, the force of the train dragged them along and the crowd was so dense behind them that you could see the crowd turn like a whip at [51] the movement of the train. For instance, the crowd was here; two or three men in front of the car caught hold of the handles of the entrance to the Pullman, and the speed of the train was such that before it stopped it dragged these men

(Testimony of William H. Anderson.)

and thereby caused a sort of a curve in the crowd as though it were a whip. That was one end I noticed particularly.

I was looking, as I say, at the Pullman—this one particularly—the only one I noticed open. That is the one I got in finally; it was here that that occurred. I had not observed any disorder among the men there at that position. Just as soon as the train got in sight and they got sight of this open end place of the entrance, they tried to get to it; they all tried to get accommodation. I could have seen what the southern part of the crowd was doing if I had taken particular notice of it. I was in a position to see the whole thing. I was back of the crowd.

The crowd extended away down as far as the freight-cars; just a very short distance from here. They finally got in there after the train stopped. It ran out about this position around that way; that is, it swayed around there. The crowd extended as far as here, but the swaying crowd, the dense crowd trying to get on the train, finally developed and surged to this point. No further than this open Pullman, because there were no other places of entrance at all, and when the train finally stopped the crowd extended no further than the door of that open Pullman, and no further than this, to my recollection; but before the train came in the crowd extended along with various densities from this position up [52] to here.

There was nothing unusual about that crowd, in my estimation. I saw Captain Ward before the

(Testimony of William H. Anderson.)

train came in there at the station; remember positively the place that I saw him. I am marking my own position "A." That is where I saw Captain Ward first. (Witness marks.) We were conversing together. And he moved forward to here. That was ten or fifteen minutes before the train came in that I saw him there. Gradually the crowd grew and filled up the space between me and him and he was finally enveloped in front of me. I didn't move from my position; didn't see him any more after the time he left me.

After he was placed in the baggage-car, I went in the baggage-car with him, and stayed with him all the time to Atascadero.

Cross-examination.

(By Mr. GORTNER.)

Immediately after the accident happened, I assumed command of the military there and ordered them peremptorily to get back. I did that absolutely by virtue of my power as a lieutenant.

Q. And having that power, you had that same power half an hour before that, didn't you?

A. Well, it would take something to define exactly what that power is. You must understand that there were soldiers of various organizations and two different branches of the army. Some were regulars and some were not regulars; some [53] were National Guard. Over the National Guard I had no more power than you or anybody else had except that I might bluff it out. I did the best I could. I saw that it was the only way to get these men to under-

(Testimony of William H. Anderson.)

stand that there was somebody hurt there. To those who were near I directed and gave them this order, an order, though, that some of them didn't obey and some did; but as far as my being in a position so that I had the legal right from a technical point of view, I probably didn't have any real power over them, excepting two or three who were in my company, more than any other officer there.

I was in uniform, and Captain Ward was in uniform, too.

Q. And after the accident happened you exercised such authority as you thought you could make effective and tried to get them back?

A. To get them out of the way and give the man a show, certainly. Possibly if there had been anything to require control of that crowd before the train pulled in there, if any emergency had been apparent, then I would have done the same thing; if there was anything in the nature of that, I would have tried to do my best. Captain Ward was my superior officer. He was First Lieutenant and I was Second. I could not say as to that, whether as the train came into view and its headlight was showing there, those men, being largely soldiers, Captain Ward called them to attention, or ordered them back or anything. I didn't see or hear anything of that kind.

There was nothing to indicate to me or to Captain Ward [54] that there was going to be any disorder in this crowd, prior to the train pulling in; there was not—except as any crowd of people waiting for a train, when it comes they do their best to get on.

(Testimony of William H. Anderson.)

As an officer there, if I had felt that any of my soldiers or any other soldiers were going to hurt one another, I think I should have called them into order, if I had seen anything to indicate any threatened disorder. I didn't do it because I didn't see anything to indicate any threatened disorder.

Q. So you, being an officer, and an expert on matters of obtaining order, there was nothing to indicate to a railroad company that there was any apparent threatened disorder, was there? A. Well, yes.

Q. Why was there something that would call upon a railroad company to police when officers present didn't do any policing?

A. I am merely a layman, as you understand, and I give this as opinion; but it seems to me that if a corporation or railroad knows there is going to be such a crowd, with the intent and frenzy to get on a train, and their forgetfulness of others, as all people are under such circumstances, it would be up to that corporation to look out for the crowd.

Q. But you didn't see anything, as an officer, to indicate that there was going to be any trouble?

A. When I speak of disorder, I don't mean to indicate a bunch of people were fighting and trying to hurt each other [55] and creating disturbances here and there and pulling at each other. The only disorder I could have seen, and did see at the final end—and that was for a very few minutes—was at the time the train pulled in, and it was simply an attempt of each and every person, irrespective of the other, to get on the train. And there were a few

(Testimony of William H. Anderson.)

civilians there, as well as soldiers. They all tried to get on the train, and the only thing they did was to run for it, and in running for it, it naturally congested, because there were only certain places to enter.

The train was moving at the time they all attempted to board it. I didn't look particularly to see where the sudden addition to the crowd, the rush of soldiers from outside somewhere as the train was coming in, came from; but they came from back of me. I waited until the very last, myself. I believe there were several saloons there. I don't know which was the nearest. There was a saloon about a block from the depot, I believe. I don't remember.

Just as the train was moving in there, a bunch of soldiers come running from back of me. There was a park, I believe, back in there somewhere, within a block at least, and some of them may have been in there. All that I can say is that there were men came from the rear of me and joined the crowd. They might have been anywhere. At least, there were men standing directly in the rear of me, a few men, and they moved up past me. It looked to me like there was about a crowd of about a hundred persons joined the crowd; plunged right in the rear of these others, so that the density of the [56] crowd was then brought up to me. I didn't back; but stood in the position I was standing all the time; stayed over here about twenty-five or thirty feet from the track.

I did not see Lieutenant Ward afterwards, as the train pulled in; didn't see whether he tried to get on

(Testimony of William H. Anderson.)

the train, or not. The crowd was in front of me. That was a crowd of varying densities before the train came in, standing in groups and bunches along the platform and along here. I would have said that this crowd was something like four or five hundred, up around the station and in the vicinity of the station about half an hour before the train came in. The crowd was increased by about a hundred more after the train came in—that is, as it was pulling in. I heard Captain Light estimate that crowd about a thousand, my judgment, is, including the hundred that came, between five or six hundred. I didn't count them.

I think this is a couple of hundred feet space in there; and the crowd was as wide as from the railroad track over to back of where I was, twenty-five feet from the track. I can put five hundred people in that rectangle, all right. It would be pretty close together.

There was absolutely nothing that indicated to my mind as an officer that those men were going to need to be controlled. There was no disorder there. The disorder that did happen, absolutely all happened after the train had got alongside of the crowd.

I do not know how quick Lieutenant Ward went down, or just when he fell. I noticed about where he fell. I think it [57] was somewhere along where that circle is there.

Redirect Examination.

(By Mr. COTHRAN.)

These soldiers coming in about the time the train

(Testimony of William H. Anderson.)

came in did not create any disorder. They simply joined the crowd in a rush to get the train, the same as the crowd that was already there was trying to do. They simply ran to the train. I do not think those men were drunk. It didn't occur to my mind. If they had been drunk, having seen quite a number of drunken people, I would have known it.

There was not a single human soul there, either at the time just before the train came in, or while it was coming in, who resorted to any violence against any of his fellows there.

[Testimony of J. L. Anderson, for Plaintiff.]

J. L. ANDERSON, a witness produced on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct Examination.

(By Mr. COTHRAN.)

I am sergeant in Company "C," Thirtieth Infantry, United States Army. Have been in the army nine years. I have had experience in connection with locomotive engines on railroads, as fireman, on the Baltimore and Ohio Railway, nearly four years.

[58]

During the months of September and October, 1910, I was at the maneuvers at Atascadero, in San Luis Obispo County, California. I had occasion to leave Atascadero on the 8th day of October, 1910, for Paso Robles, at nine o'clock, by railroad. I recall purchasing a ticket there the same, it appears to me, as this ticket marked "Two-day Excursion Ticket,

(Testimony of J. L. Anderson.)

Paso Robles, to Atascadero and return." I should judge that there was five or six hundred men among the army men, and both of the regular army and of the guard of California here, who were in Paso Robles, who went from Atascadero on the 8th day of October.

I know Captain Ward, the plaintiff here. I seen him at the depot on the evening of the 8th of October, 1910, at Paso Robles, first, at half-past nine. As nearly as I can recall, I saw Captain Ward twenty or thirty minutes before that train came in. It was ten minutes late. I don't remember what the schedule time was for it to arrive.

Mr. GORTNER.—I think it is 10:46. Probably a few minutes late.

I remained there among the soldiers who had bought tickets and return, in the evening, after I went there, until the train arrived. Captain Ward remained there. We people come down there to wait for the train. There was from three hundred to four hundred people before the train came in. I did not see any body of men come running over just as the train came in; did not see a bit of disorder of any kind in that crowd. As the train was passing the depot, they all just kind of moved toward the train, naturally. [59]

In my judgment, as one who was four years fireman of a locomotive, the speed at which that train came into that station that night was eighteen to twenty miles an hour. There were five or six coaches, to my best recollection.

(Testimony of J. L. Anderson.)

Mr. GORTNER.—It is a regular New Orleans-Sunset train. I think it had the engine, tender, either an express-car and a baggage-car, or two baggage-cars, and then a day coach and then two chair cars and then three Pullmans.

The WITNESS.—I don't think there was ten coaches; there was less than eleven. The rear day coach stopped a half a car north of the end of the depot, right about here. (Witness marks.) When the train came in I was standing in that crowd in front of the depot door, rather the ticket office, waiting-room. The crowd was mostly at the end of the station from the ticket office door; north end of the station along the platform; the general limits of the crowd was right in this here; along in here.

Mr. GORTNER.—Indicating along the row of posts.

Mr. COTHRAN.—There were no posts there then.

The WITNESS.—Along the passenger track, along here, all through along in here, and this track, the train came in and the crowd was gathered along in here. There was not a particle of disorder among any of them at any time. While the train was coming in I was not observing all of the crowd; just what was right close to me. They were just standing there and waiting around for the train. I did not see the crowd run or anything of that kind.

Q. Do you remember what kind of a light the locomotive had that night? [60]

Mr. GORTNER.—That is objected to as immaterial and irrelevant.

(Testimony of J. L. Anderson.)

Said objection overruled by the Court, to which ruling the defendant, by its counsel, then and there duly excepted.

Exception Number Nine.

A. Well, it was not an electric light. It must have been—it was a very bright light, as you will see on any passenger train. There is a curve in the track, away up here, something like nineteen hundred feet from that station; then the track stands right out straight after it leaves that curve, clear down.

Q. Do you know how far these lights will throw so that an engineer can see?

Mr. GORTNER.—That is objected to as immaterial, irrelevant.

Said objection was overruled by the Court, to which ruling of the Court the defendant, by its counsel, then and there duly excepted.

Exception Number Ten.

A. A good four hundred yards. It was first brought to my knowledge that someone was injured by hearing some one holler that some one was hurt. When I last saw Captain Ward before the train came in, he was near the crowd and about fifty or seventy-five yards north of the end of the station, pretty well in back. In the position Captain Ward was standing, he was about opposite one of these Pullman, or chair cars, when I last saw him, and where one of them [61] stopped, about the position where he could take it very easily. He was about fifteen feet from the track on which the train came in, I judge.

(Testimony of J. L. Anderson.)

I did not see the Captain after the train had come in and stopped until I heard some one holler. I saw him shortly afterwards, laying just a few feet from the car. He had been pulled from under the train. They were there, I think, rebinding the tourniquet around his leg when I got to them, first seen him.

What was the condition of the platform and the train and the seats and so forth?

Mr. GORTNER.—Objected to as irrelevant and immaterial.

Said objection was overruled by the Court, to which ruling the defendant, by its counsel, then and there duly excepted.

Exception Number Eleven.

A. The train was crowded; I went through about three cars; they were all in the same crowded condition. [62]

[Testimony of Roy Knowles, for Plaintiff.]

ROY KNOWLES, a witness produced on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct Examination.

(By Mr. COTHRAN.)

I am private in the United States Infantry; was in the United States Army in October, 1910. I know Captain Ward. On the 8th day of October, 1910, I was at the Paso Robles station in the evening. I should judge there were between four and five hundred men gathered there along in the evening before the Sunset Express came in from the north.

(Testimony of Roy Knowles.)

I saw Captain Ward there before the train came in. He was about fifteen feet from the station on the left-hand side when I seen him, north, about twenty minutes before the train came in. I did not see him after the train came in. I should judge that train came in at a speed of between eighteen and twenty miles an hour.

I did not see any disorder in the crowd; nobody running. As the train was coming on, the crowd just moved towards the train, all along. The crowd was all around there on that asphaltum foundation, which was about flush with the tracks, scattered around there. I saw the freight-car there that evening. What fixes it in my memory now is that I was sitting on top of the car. Just three cars were along there. There was ten or twelve men sitting on top of that car, besides myself, before the train came in.

Pullmans were behind the day coach; there were three [63] or four coaches ahead here where the last one stopped. The crowd swung into this narrow space along here to try to get space there or passage on the car; right in between the freight-car and the passenger coach.

I did not see Captain Ward at the time the accident happened to him, nor afterwards. I got on the cars after two-thirds of the crowd had been on, I guess. About a third of the crowd had got on, when I got on. I got on the cars after the accident was over. They were crowded.

[Testimony of Elijah H. Griffin, for Plaintiff.]

ELIJAH H. GRIFFIN, a witness produced on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct Examination.

(By Mr. COTHRAN.)

I am sergeant in the United States Army; was such in October and September, 1910; was at Atascadero with the army. I went to Paso Robles on the 8th day of October, 1910.

I know Captain Ward; saw him there at the Paso Robles station on the evening of October the 8th, 1910. In comparison of the crowd there with a battalion of infantry—I should judge there would be about four hundred and fifty or five hundred men there. I saw Captain Ward there about 10:15, I guess, 10:20; somewhere along about that time. He was standing near the station—I think it is about fifty feet north of the station—talking to some gentleman in civilian clothing. I later found out that he was a doctor [64] in the army. At the time the train came in I was standing near the north end of the depot.

The crowd was lined up along the track, I judge, about fifty or seventy-five feet from the end of the depot; about fifty or seventy-five feet north along the track. I am not positive whether the crowd extended as far south as the place described by a witness, where the freight platform is with a box-car beside it; but it extended to in front of the depot, in

(Testimony of Elijah H. Griffin.)

front of the waiting-room. If there was any disorder there or violence of any kind upon the part of any human being against another human being at any time, I didn't see it. I was in front of the waiting-room, near the corner.

Q. In your judgment, at what speed did that train come in?

Mr. GORTNER.—Objected to as no foundation laid.

Said objection was overruled by the Court, to which ruling the defendant, by its counsel, then and there duly excepted.

Exception Number Twelve.

A. I don't know just exactly how fast the train came in, but I know it was coming in fast. It came in faster than you generally see a train come into a station. I have seen several trains come into stations and I don't believe I ever saw one come into a station as fast as that one came in. I didn't go in the train at all. I think the last day coach, I think the crowd went into the day coaches; I don't think any of them went into the Pullman. The front end of the car was about even with the north end of the depot.

I saw Captain Ward after the accident there; he was on [65] a stretcher when I saw him. I saw someone go down in the crowd. I didn't know it was him until afterwards. I saw someone go down, and there was someone else went down also; and he got up and he said, "Nobody hurt." Well, when he said

(Testimony of Elijah H. Griffin.)

that I started on down towards the front end of the train to try and get a car, to get in a car, and I heard someone say, "There is someone hurt," and then I turned and went back up to where Captain Ward was, and by that time the doctor was in putting the belt on his leg, and had him on the stretcher, and carried him down to the baggage-room, I believe, or some room in the station, and left him there till they got him in the baggage-car.

Testimony of John Hall, for the Plaintiff.

JOHN HALL, a witness produced on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct Examination.

(By Mr. COTHRAN.)

I am in the Hospital Corps of the United States Army; was in that position in September and October, 1910; was at Atascadero, San Luis Obispo County, California, at that period. I know Captain Ward. I had occasion to go to Paso Robles on the 8th day of October, last year; went up there on a pass from Atascadero. I was at the Paso Robles depot on the evening of the 8th of October.

I remember seeing Captain Ward, the plaintiff, there; [66] he was standing about fifty feet north of the station, the platform; there was someone with him, but I didn't recognize who it was. I did not pay any attention to whether he stood there until the train came in or moved somewhere else. It was about ten minutes after ten when I got down there,

(Testimony of John Hall.)

and the train came in about fifteen minutes or twenty minutes afterwards; I don't remember definitely the exact time. I stayed there at the station until after the accident happened. While I was there, and before the train came in, I should judge, there was about three to four hundred people there. It was an orderly crowd. I did not see any one resort to any violence against any human being there, in any way at any time. I should judge that the train, as it came into the station, was going at the rate of about twenty miles an hour.

I saw Captain Ward after the train had stopped; he was about five feet away from the train, moved away. The hind end of the last day coach stopped about even with the waiting-room. I got on that train; it was crowded.

Cross-examination.

(By Mr. GORTNER.)

I don't know; I never figured out how many feet a vehicle goes in a second when it is moving twenty miles an hour. I couldn't say whether it is going five feet a second or ten or fifteen or twenty, or what it is going. I saw that train going along there, saw it for a space of three or four seconds as it passed, parts of it passing me. I know the [67] train was going fast when it came in. I estimated at a rough guess that the train was going twenty miles an hour. I was standing within fifteen feet of the engine as it went by me, and it sounded pretty loud. From the noise and the movement of the train, that

(Testimony of John Hall.)

is the way I judged there was a whole lot of speed. I never did drive an automobile, nor ride a motorcycle with a speedometer. As far as I know what twenty miles is by the judgment of a moving train, I would know what twenty miles an hour is, or a moving motorcycle, or something of that sort. I never railroaded any. I did not pay any attention as to whether the steam still was working on the engine as it went by me.

The train was coming around that curve when I first saw it. It took something like five or six seconds, I suppose, before the engine went by me. That would be my best judgment. My judgment on that is just as accurate as it is on this twenty miles an hour. Making a rough guess at it, I should judge it would be about five seconds. I don't know how many feet it would be per second. I don't know whether that would be as much as three hundred miles an hour, or not. I have only a rough guess, estimation, about the speed of that train; I would say it was going about twenty miles an hour. I didn't get that off of anybody. That is my own estimation. I have talked to the other fellows about different things, I didn't practically, about this twenty miles an hour. The only time all of us three or four army men, sergeants, who have testified, ever got together was during the time we was in front of the attorney; there was no agreement at that time on the speed at all. The [68] soldiers never attempted to get on the train when it was going twenty miles an hour. I didn't see anyone trying to board the train while it

(Testimony of John Hall.)

was moving, not a soul, not while it was moving; not that I noticed. The only thing I noticed was the train was going past the station, or somewhere near passing the station, and the crowd commenced going the way that the train was going. I didn't myself see anyone of the whole crowd try to board any part of the train while it was passing. [69]

Testimony of Samuel Young [for Plaintiff].

SAMUEL YOUNG, a witness produced on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct Examination.

(By Mr. COTHRAN.)

In October and September, 1910, I was a private in Company "C" of the Thirtieth United States Infantry; have had experience in railroading; fired for five months on the Cincinnati, Hamilton & Dayton in Ohio. On the eighth of October, 1910, I was at Paso Robles. I arrived at the station on the evening of October the eighth, at a few moments after ten o'clock; something like five or ten minutes after ten. I don't remember exactly. I waited in the waiting-room, I should judge, fifteen or twenty minutes. I crossed over to a place on the corner to get a drink. I stayed there five or ten minutes and then came back; got a drink of water. I went to get a glass of beer, but I could not get it. There was no beer there and I crossed back behind to the pump and got a cup of water. There was no beer or liquor there to be sold. After getting a drink of water I went back,

(Testimony of Samuel Young.)

and when I got back I passed Captain Ward on the platform. I remember that I passed him because I saluted him. He was north of the waiting-room with someone, but I don't remember who it was. That was about ten or fifteen minutes before the train was due. When I came back from across to that corner place there getting a drink of water, I went inside the waiting-room, [70] remained there until it was time for the train to arrive. It was something like ten forty-five or ten fifty; somewhere along there. Then I walked out of the waiting-room and sat in the front of the waiting-room until the train came in.

There was a box-car just to the right here; at least two or three cars, freight-cars or box-cars down further. This is the track on which the train came in. It didn't come in on the freight track. When the engine passed, I was right here. The train came on, the day coaches passed up in here, and the majority of the crowd, as near as I can judge, was standing right in front of the waiting-room. Now, when the day coaches passed, the crowd moved up in toward these box-cars. I stood right here until there was quite a bit of the crowd passed so I could edge my way and get up between the box-cars and the passenger coaches to get on the train. The head of the rear day coach just passed the first box-car; the rear of the day coach was just past the waiting-room.

While I was standing there, as the engine went by, I should judge it was going around twenty miles an hour. I have been around trains quite a bit and rid-

(Testimony of Samuel Young.)

ing on an engine. When the train came in I should judge the crowd was around six hundred. I think the crowd was there by the time the train was due. The train was late. I waited inside the waiting-room until the train was due. Then I went outside the waiting-room and I waited there, [71] I should judge, ten or fifteen minutes. I did not see or hear an *irruption* or rushing in there of a lot of men into that crowd at the time the train was coming in. I was there when the majority of the crowd was there. When the day coaches passed the waiting-room, the crowd began to move in that narrow space between the train and the box-cars. I waited myself, in front of the box-car until quite a bit of the crowd got on the train so I would not be in too big a crowd to get on the coach—the coach I got on. The first part of the train was lit up, but the coaches that stopped directly in front of the waiting-room were darkened. I took the coaches to be sleepers, they were darkened, and the remainder of them in front were lit up. The crowd moved up in toward the lit coaches, the coaches that were lit up. I am positive about that. These rear coaches were unlighted.

I did not see any man whatsoever at any time there make any violent disturbance or assault on anybody, or do anything in a disorderly way; not a thing.

I saw Captain Ward after the train arrived at Atascadero. I saw him when they were unloading him from the train; did not see him any more until he was taken off at Atascadero. After that train arrived I worked up to where I could get onto the coach

(Testimony of Samuel Young.)

that was not filled, and I got on the coach and stayed there until we arrived at Atascadero. I got on the second day coach from the Pullman. I had to pass the first box-car to get on the second coach. [72]

Q. What was the condition of that coach?

Mr. GORTNER.—Objected to as immaterial.

Said objection was overruled by the Court; to which ruling of the Court the defendant then and there excepted.

Exception Number Thirteen.

The WITNESS.—The first coach was crowded so I could see from where I was standing there was no use trying to get on that; and when I tried to get on the second coach it was crowded, and I just did get in, and I stood up all the way into Atascadero.

As I saw that crowd did not try to get on the train while it was in motion and before it had stopped. I said the greatest part of the crowd was near me here in front of the station. They got away from the train. The train passed so fast that the crowd even backed towards the station, the waiting-room. When I say the train was coming in at twenty miles an hour I mean the engine as it went by. The train was stopped rapidly. I could hear the air working in the engine as it passed. When the day coaches passed the waiting-room, that is when the crowd first began to work forward. As near as I could see they first made an attempt to board the coaches after the train had stopped. The platform was very poorly lighted. I couldn't state the number of lights.

(Testimony of Samuel Young.)

When I first took notice of the train at all, it was, I should judge, one hundred and fifty or two hundred yards away from me.

Q. Was there any man representing the Southern [73] Pacific Company or any agent out there attempting in any way to guide or direct that crowd about boarding the train?

Mr. GORTNER.—That is objected to as immaterial and irrelevant, it appearing from the plaintiff's own proof that there was not any disorder or anything calling upon the Southern Pacific Company to restrain or control a crowd that did not need any control or restraint.

Which objection was overruled by the Court, to which ruling of the Court the defendant then and there duly excepted.

Exception Number Fourteen.

The WITNESS.—There was no one that I could see at all.

Q. Did you hear anyone say anything to the crowd about boarding that train?

Mr. GORTNER.—The same objection, and as immaterial and irrelevant.

Said objection was overruled by the Court, to which ruling of the court the defendant then and there duly excepted.

A. No, sir.

Exception Number Fifteen.

Cross-examination.

(By Mr. GORTNER.)

I stood between the waiting-room and the main

(Testimony of Samuel Young.)

track as the train went by. The majority of the crowd was right in front of the waiting-room. Of course there could not four or five hundred men get directly in front of the waiting-room, but the center of the crowd was directly in front of the waiting-room. [74]

I did not see Captain Ward get hurt; didn't see whether or not about a hundred or seventy-five feet north of the station any sudden rush was made from the west by a bunch of soldiers towards the crowd. I didn't see any rush at all. I think I could see quite a bit of the crowd. I was in a place where I was not looking for anything like that. I could not see seventy-five or a hundred feet there and see whether that happened or not. I don't know whether anything of that kind happened or not, seventy-five or a hundred feet north of the station.

Testimony of Henry D. Thomason, for Plaintiff.

HENRY D. THOMASON, a witness produced on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct Examination.

(By Mr. COTHRAN.)

My name is Henry D. Thomason. In September and October, 1910, I was captain in the medical department of the United States Army. I was on duty in the War Department, in the division of militia affairs, in charge of medical matters pertaining to the organized militia of the entire United States, my headquarters at the War Department, Washing-

(Testimony of Henry D. Thomason.)

ton. Apart from the duties I was fulfilling at that time I am a regular physician and surgeon. I was at Atascadero, under orders of the War Department, as an observer of that camp.

I had occasion to go to Paso Robles on the eighth day of October, 1910, not in an official capacity, [75] but to visit socially some friends who were stopping at the Paso Robles Hotel. I went up on the train; purchased a round-trip ticket from Atascadero to Paso Robles Springs. I think it was an excursion ticket. To the best of my recollection it was the kind of ticket now shown me. It was from Atascadero to Paso Robles and return. If I remember rightly, it was sold at a reduced rate. My recollection is it was in the afternoon that I took the train from Atascadero to Paso Robles on that eighth day of October. I remained in Paso Robles that day, from the time I arrived, at that time, I believe, was some time in the afternoon, until the southbound train at night passed.

I went to Paso Robles station in the evening to take the southbound Sunset Express, the train returning to Atascadero. I arrived about ten minutes before the train was due, which I believe was 10:40 something. When I arrived I was told the train was ten minutes late. I know Captain Ward, the plaintiff here. I met him at that station; had a conversation with him. I met him very soon after I arrived at the station, and I think occupied the entire time talking to him. I should estimate it was about twenty-five minutes before the train actually came in

(Testimony of Henry D. Thomason.)

that I was with Captain Ward. After arriving and finding that the train was late, I think we walked throughout this station space several times (indicating); and if I remember correctly, we leaned up against something in the rear here—I don't know what it was—and talked. Then when the train was reported coming or [76] was due, we came forward and occupied a space to the north of the waiting-room, a little back from the track. The lights throughout the space was dim; I don't recall how it was lighted. Subsequent events recall to mind that there were some cars on the freight track next to the station. I didn't notice them when I was waiting for the train, however.

After Captain Ward was injured and he was being borne on a litter down towards the baggage-car, we had to pass through a space between the train and freight-cars on the next track and we had difficulty getting through the crowd there, and turned the litter in order to place it in the baggage-car. Those circumstances that I explained leads me to believe that there were cars along the freight track that night, but I didn't notice them prior to the arrival of the train. I noticed them after the accident.

I don't know that I have any accurate idea of the distance north of the waiting-room Captain Ward and I were standing when that train came in. It was at the distance that we presumed would be about the point that the passenger coaches would stop. I wouldn't dare to venture to say how far it was. I don't know whether the passenger coaches stopped

(Testimony of Henry D. Thomason.)

where I had placed myself and presumed they would stop, because after the injury there was so much confusion I didn't notice what cars were standing there, whether they were passenger coaches or what they may have been, that is, whether they were day coaches or Pullmans, or what, I don't know that.

[77]

So far as I know, as the train passed by, the passenger coaches were lighted. I don't know how they were lighted. I have no recollection as to whether or not the curtains were drawn. It was light. I saw the lights in the windows. I don't know in what coaches I saw the lights lit. I remember the baggage-car, and I think another darkened car passed without lights, but when it came to the passenger coaches, I recall that there was lights in them. I have no recollection whether any of the coaches or cars, Pullman or otherwise, in the rear, were lighted or not. I didn't see the rear of the cars to my recollection, I don't know that I did. Just before that train came in I should say there was in the neighborhood of four hundred and fifty or five hundred persons there. I could be confident that I was somewhat to the north of the waiting-room with Captain Ward.

Q. State whether or not you were in a position to see any accession to the crowd about the time the train came in, in the position in which you and Captain Ward stood.

Mr. GORTNER.—Objected to as calling for the

(Testimony of Henry D. Thomason.)

conclusion of the witness, and invading the province of the jury.

Said objection was overruled by the Court; to which ruling the defendant, by its counsel, then and there duly excepted.

Exception Number Sixteen.

A. I could see if there was a large accession. I don't suppose I could have told whether a few men joined the crowd, but any large accession I could have seen. There [78] was no large accession of men to that crowd, to my knowledge, as the train came in. The crowd was large from the time that I reached there prior to the arrival of the train. I did not notice anyone coming into the crowd from my position after the train was due. As the train went by I did not see anyone attempting to board the train while it was in motion. I should say the speed of the train was in the neighborhood of twenty or twenty-five miles an hour.

Q. Why do you say that?

Mr. GORTNER.—That is objected to as incompetent, irrelevant and immaterial, calling for a comment of the witness upon the value of his own testimony.

Said objection was overruled by the Court, to which ruling defendant by his counsel, then and there duly excepted.

Exception Number Seventeen.

A. I have boarded a good many trains under all circumstances and in a good many stations throughout the United States. I can say that riding an auto-

(Testimony of Henry D. Thomason.)

mobile, I think I know about what twenty or twenty-five miles an hour speed is. I cannot recall accurately how far down we had to go in order to put Captain Ward in the baggage-room. I know we had to go some distance south to put him into the baggage-car.

Q. Captain, did you see any agent, station agent or representative or persons pretending to represent the railroad or anybody else there, who attempted in any way to regulate the crowd, or its admission to that train that night? [79]

Mr. GORTNER.—That is objected to as incompetent, irrelevant and immaterial.

Said objection was overruled by the Court; to which ruling the defendant, by its counsel, then and there duly excepted.

Exception Number Eighteen.

A. I did not.

Q. Did you hear any statement made by any agent or any person in behalf of the Southern Pacific, or anybody in reference to the admission of that crowd, or of the manner in which they should take the train?

Mr. GORTNER.—The same objection.

Said objection was overruled by the Court; to which ruling the defendant, by its counsel, then and there duly excepted.

Exception Number Nineteen.

A. I did not. At the very time the train came in I was directly next to Captain Ward on the southward side. Captain Ward was, I should say

(Testimony of Henry D. Thomason.)

six or eight feet away from the tracks at the time the train came in. When the engine went by there were a few persons ahead of him, and we were both surrounded on all sides, in front and behind and on either side, by a crowd of people. It is my recollection that there were other men closer to the track than he.

Immediately after the engine passed there was a sudden stopping of the train, and the brakes were put on, and the train began stopping very quickly. At that, I [80] felt myself being carried by the crowd toward the train, and in a southward direction. I was separated from Captain Ward. He disappeared. After the train stopped I heard several say, "A man under the train!" and I turned northward and found Captain Ward sitting on the ground, as I recollect it, facing the north, and holding onto his leg, at the same time giving directions to some of the men to find Doctor Thomason, that he was in the crowd somewhere. I saw that the leg was hopelessly crushed, and I recall now I took off his legging, which was crushed and torn, and put a tourniquet on above the knee. The crushing was about the middle of the third—the juncture of the middle and upper third of the leg. Of course the limb was examined more carefully later, but at that time I can't recall just what angle that it occurred to me it was crushed then. I put a belt or tourniquet above the knee, and called for a litter; someone brought the litter and he was carried into the baggage coach.

(Testimony of Henry D. Thomason.)

It was the right leg. My recollection now is that the injury was at an angle, but just how acute an angle I am not prepared to say. I went to the telegraph office to prepare a telegram for the commanding officer of the field hospital in the Camp Atascadero, advising him of the injury and asking to have an ambulance upon the arrival of the train at Atascadero, and to prepare the operating tent for an amputation. I returned into the baggage-car and stayed with Captain Ward until after his arrival at Atascadero; rode with him in the ambulance to [81] the field hospital, and assisted in the amputation of the limb, disarticulating at the knee joint. We amputated at the knee joint. It was crushed below the knee joint, but we had to amputate the knee joint in order to get sound tissue for repair.

After Captain Ward was put in the baggage-car, and during all the time I saw him on the ground, he was in a condition of shock, absolutely conscious; had all of his faculties. He remained conscious right along and absolutely conscious until given the anaesthetic at the time of the operation.

Cross-examination.

(By Mr. GORTNER.)

There was no indication to my mind of any necessity of controlling the crowd before the train pulled alongside. There were officers of the army present. I did not hear any army officer make any attempt to call the soldiers up in rank or call them in attention—put them in line or rank, or anything of that sort. Before the train had pulled alongside there

(Testimony of John Wilbur Ward.)

seemed to be no necessity at all for that. At various times before the train pulled in, Captain Ward and I stood quite a little further away from the main track. As I recollect it now, we walked up and down, backwards and forwards in that space to the north of the ticket office, side by side, conversing with one another. The crowd wasn't so thick but what we could walk through it; the crowd was scattered. During that period of time while I was walking and talking with the Captain, [82] we were twenty-five feet back from the track. We walked various distances from the track; made one circle or two, possibly, and occupied the whole space.

I was going on that same train. I understood Captain Ward was going on that same train. Then when the train pulled in, we got in the fore part of the crowd; we were not in front. There were men in front of us; we were towards the front. We got over there because we wanted to get onto the train when it came in. I have no recollection that we wanted to beat any of the others on that we could; we wanted to be pretty prompt in getting on. I had gotten separated from Lieutenant Ward when he went down. He just simply disappeared. I didn't see him go down. The crowd had separated us. I was carried away from him, or he was carried away. I have no recollection now of seeing the Hotel Alexander auto bus there, but I know the bus had to go, because I was asked to ride in it from the hotel, but I preferred to walk. I do not know who did ride in it. I did not see a crowd of a dozen or so soldiers

(Testimony of John Wilbur Ward.)

in that bus as the train pulled in.

The crowd that swung me away from Captain Ward was already there, to the best of my knowledge and belief, and had been there all the time. When we knew the train was coming, some distance before it came, the crowd collected together, and we were pretty well pinched and crowded before the train came in. I did not see a soul try to board that train before it stopped. I was looking out for myself; was not trying to avoid the train, because I was being carried down and [83] pressed. I was trying to push back. I did not see any hands up and reaching for the handle-bars as the train was moving there. I will swear that I didn't see any such thing take place; that is as far as I will go on that.

I assisted in the surgical treatment that was given to the Captain. There was a drainage tube left inside of his leg by the doctor at the time of the operation. Whether it was a tube or a silkworm thread I don't remember now, but my recollection is that a drainage was left there. I left, I think, the next day, for the east, and my professional connection with the case ceased then. I think Captain Ward did not attempt to board the train as it was moving. I didn't see him. I didn't see him pulled out from under the car; don't know how many wheels ran over him.

Redirect Examination.

(By Mr. COTHRAN.)

When a man's leg is amputated that way, it depends upon circumstances whether a drainage tube is

(Testimony of John Wilbur Ward.)

left. That is a matter of surgical judgment. If there is a great deal of contusion and it would be expected that there would be possible infection from retained bruised tissue, it is customary to leave a drainage. The limb has healed just in the place we amputated.

**[Testimony of John Wilbur Ward, in His Own
Behalf.]**

JOHN WILBUR WARD, the plaintiff, produced as a witness in his own behalf, having been first duly sworn, [84] testified as follows:

Direct Examination.

(By Mr. COTHRAN.)

My full name in John Wilbur Ward. I was born in Henderson, Kentucky; was First Lieutenant in the Regular Army of the United States on the 8th day of October, 1910; am now Captain; was very near promotion at the time of this accident from lieutenant to captain. I entered the United States army in May, 1898; was mustered in the service of the United States as straight volunteer in May, 1898.

Q. State just generally, without any details, through how many actual engagements of war, you have passed.

Mr. GORTNER.—Objected to as immaterial and irrelevant.

Said objection was overruled by the Court; to which ruling of the Court the defendant, by its counsel, then and there duly excepted.

Exception Number Twenty.

(Testimony of John Wilbur Ward.)

A. Fifty-seven. During the months of September and October, up to the 8th day of October, 1910, I was, during the greater part of the time, at Camp Atascadero, San Luis Obispo County, California, at the maneuver. I was in command of Company M, Thirtieth Infantry, and in charge of the Regimental Post Exchange.

Q. What were your duties with reference to the Post Exchange?

Mr. GORTNER.—Objected to as immaterial and irrelevant.

Said objection was overruled by the Court; to which ruling the defendant, by its counsel, then and there [85] duly excepted.

Exception Number Twenty-one.

The Post Exchange was a general store; sold nearly everything. I had entire charge and control of it, under the laws laid down by Congress and the Secretary of War, especially in regard to buying and directing the selling and receiving the funds which were brought in; and also the Post Exchange council, of which I acted as secretary, and the Post Exchange council consisted of all the company commanders in camp, approved by the Colonel.

I had occasion to go to Paso Robles from Atascadero on the 8th day of October, 1910. I think my train got there about 4:30, or in that neighborhood; late in the afternoon. I don't remember the time. And I was there until the night train went back to Atascadero, about 11 o'clock P. M.

(Testimony of John Wilbur Ward.)

Q. Captain, do you know whether or not there was an agent of the Southern Pacific at Atascadero on the 8th day of October and prior to that time during October and September, apart from the regular agent of the Southern Pacific Company?

Mr. GORTNER.—Objected to as immaterial and irrelevant.

Said objection was overruled by the Court; to which ruling the defendant, by its counsel, then and there duly excepted.

Exception Number Twenty-two.

A. There were two agents there during the encampment.

Q. Do you know the number of trains that ran from [86] Atascadero into Paso Robles that day?

Mr. GORTNER.—Objected to as immaterial and irrelevant.

Said objection was overruled by the Court; to which ruling the defendant, by its counsel, then and there duly excepted.

Exception Number Twenty-three.

A. There were six passenger trains ran in the daylight hours between Atascadero and Paso Robles. Three of them were specials.

Q. Do you know the number of trains that ran from Paso Robles to Atascadero that 8th day of October?

Mr. GORTNER.—Objected to as immaterial and irrelevant.

Said objection was overruled by the Court; to

(Testmony of John Wilbur Ward.)

which ruling the defendant, by its counsel, then and there duly excepted.

Exception Number Twenty-four.

A. I do not, except that I know that only one train went south after the special had taken the crowd up for this swimming event up to Paso Robles. That was the Sunset Limited, due at 10:45.

Mr. GORTNER.—We move to strike out the answer as purely negative testimony, incompetent and irrelevant.

Said motion was denied by the Court, to which ruling the defendant, by its counsel, then and there duly excepted.

Exception Number Twenty-five.

I bought a ticket before I left Atascadero. This ticket shown me is the return coupon of a round-trip [87] excursion ticket from Atascadero to Paso Robles and return; and is the one that I purchased at Atascadero and had in my pocket when I went to the Paso Robles station on the night of October 8th to get the train to return to Atascadero.

Mr. COTHRAN.—We will offer this in evidence now.

Said document, marked "Plaintiff's Exhibit 5," and being in words and figures as follows: "Southern Pacific Company. Two day excursion ticket Paso Robles to Atascadero," marked in margin "Return. Good only for one continuous passage if used within two days from date of sale stamped on back hereof. Baggage liability limited to \$100. Charles

(Testmony of John Wilbur Ward.)

T. Freeland, Passenger Traffic Manager. Form 423," with number "1001. Southern Pacific Company," on the back of it, stamped, so far as it appears, these words: "So. P. Company, October 8, 1910. Atascadero." In lead pencil, "J. W., October, 1910."

There was a very large crowd at the station when I went to buy this ticket; probably forty or fifty people in line buying these tickets. The rest of them were standing around generally throughout the station grounds.

Q. Do you know whether or not the soldiers and officers of the United States Army and the National Guard who were at Paso Robles that day bought this same kind of ticket—return?

Mr. GORTNER.—That is objected to as immaterial and irrelevant.

Said objection was overruled by the Court; to [88] which ruling the defendant, by its counsel, then and there duly excepted.

Exception Number Twenty-six.

A. I know that a very large portion of them did.

Q. I will ask you if you know whether or not there was a swimming contest at Paso Robles on the evening of October 8th, 1910.

Mr. GORTNER.—Objected to as irrelevant and immaterial.

Said objection was overruled by the Court; to which ruling the defendant, by its counsel, then and there duly excepted.

Exception Number Twenty-seven.

(Testimony of John Wilbur Ward.)

A. Yes.

The swimming contest was pulled off about half or three-quarters of an hour after the schedule time, and occurred about a quarter to nine o'clock. It was scheduled for eight o'clock. The next train after that contest was over was the Sunset Express, which was due at about 10:46. I went to the Paso Robles station from the town of Paso Robles to take the train in the hotel bus. It was twenty minutes after ten when we left the hotel. There is only one hotel bus, I believe. It could not have been over ten minutes from the time we left; say about half-past ten, when we arrived at that station of Paso Robles in the evening. The bus stopped here by the light, and I walked down here and looked in the station door, and I came out and I met a number of officers I knew and I stopped at short intervals and talked to them. And along in here [89] I met Captain Thomason. This was off the platform. The platform from here to the station is about thirty-five or forty feet. He and I walked around in this open space quite a little while. There was only one light there outside of the station. I judge it was an incandescent light. It was on a high pole about forty-five or fifty feet from the corner of the station and almost on a line with the corner of the station; that is, the northeast corner of the station.

I stopped, talking to two or three officers for a few minutes along in the neighborhood of the light. I met Lieutenant Anderson and spoke with him quite a little while; and then in a few minutes I met Doctor

(Testimony of John Wilbur Ward.)

Thomason and we walked around here and talked. Shortly before the train was due we took the position, I suppose along in here, near the first track; and as the train became due I looked at my watch and said, "It is late." And then a few minutes later we moved up across the freight track—a short distance across it—about in this neighborhood; and glanced down that way and didn't see anything and we remained standing there until the train came in. We were in what I would call the—you might say the fringe of the crowd. It was very thick down here. From my observation I would say that the crowd was so thick that a person would have trouble from the neighborhood of this light all down there in making a way through it. I would say that was about a hundred feet north of the station and west of the first freight track. It was about that neighborhood (indicating cross-mark). [90] And then, after the train became due and didn't come in, a few minutes later we moved across the freight track. I would say it was about the same distance north of the station and a short distance west of the center between the freight and the passenger track, in the neighborhood of the center, approximately. We were about a hundred feet to the north of the station-room and I would say about half-way between the two tracks, the freight and passenger tracks. I should say we were seven or eight feet from the passenger track, just before the engine passed or came in.

I was not the closest one to this railroad track.

(Testimony of John Wilbur Ward.)

The train was not in sight, and we were standing between the track, near the center of the space between the tracks—directly between me was lined with four or five or six men; it might have been seven or eight; there were quite a few men directly between me and the track and they extended to both sides. Now, as the train whistled we were standing there and there was plenty of room. The crowd was not jammed up close. As the train whistled, this business closed in toward the first track and we found that we were standing in quite a jam; still there was this number of men between us and the track.

As the train whistled it was out of sight. A short time after it whistled we could hear it; and then it came in sight around the curve. Everybody saw the flash of the headlight right straight down the track, on this curve which is about nineteen hundred feet from the station. And within a very short space of time—it seemed to me not [91] more than a very few seconds—the train was passing, the engine was passing. We stood side by side, Captain Thomason and myself, looking at it. I was on the point of making a remark that I didn't think the train was going to stop, when I heard the—possibly the brakes go on; heard some kind of a noise of grinding, like that—and about that time a surge of the crowd separated us. I don't know where Mr. Thomason went or anything else.

It seemed to me like in a second or two I found myself in a whole bunch of men right out next to the train, and the first thing I knew I was under it. I

(Testimony of John Wilbur Ward.)

do not know how many cars or wheels passed over me. At no time there that night after that train was in sight until the accident occurred to me did I make any attempt to board that train. There was between five and six hundred persons present before the train came in. I have no way of estimating that more accurately.

As a military man I am familiar with the vehicles of transportation. That is a most important element of instruction in connection with the army. We are trained in that, in the very beginning. When the engine and the first one or two cars passed me as it came in that night of October 8, 1910, it was going about twenty-five miles an hour. No man lifted a hand of violence against me. There was not any drunken men there. No one used any violence toward me. There was nothing that occurred outside of the natural surging of that crowd to get accommodation on that train before this accident occurred to me. While Captain [92] Thomason and I were in the place finally indicated by me, I did not see any accession of men rushing in here from toward Eighth Street or back here from the west, or in there anywhere. Nobody rushed in from that end of the crowd. The crowd, up to the time the train was due, was constantly increasing. After the time it was overdue there were very few people, if any, joined the crowd.

Q. Did you hear anyone give any warning or any direction as to the manner in which the crowd should take that train?

(Testimony of John Wilbur Ward.)

Mr. GORTNER.—Objected to as immaterial, incompetent and irrelevant.

Said objection was overruled by the Court; to which ruling of the Court the defendant then and there duly excepted.

Exception Number Twenty-eight.

A. No. There was no agent there at all among the crowd.

Q. Did you see any agent at the station or in the station premises there that night?

Mr. GORTNER.—Objected to as immaterial and irrelevant.

Said objection was overruled by the Court; to which ruling of the Court the defendant, by its counsel, then and there duly excepted.

Exception Number Twenty-nine.

A. I caught a glimpse of a man selling tickets, the only one there. While that train was in motion, I did not move forward to try to board that train. I tried to put myself back when the crowd closed in. [93]

Right after the train was stopped the men discovered that I was sitting there on the ground injured, and two of them stopped and leaned over me—the crowd continued passing down toward the—to get on the train—and said, “What is the matter?” I said, “The train has gone over my leg.” They put a tourniquet on and then got a doctor. He said, “I haven’t anything.” I was holding the artery. I said, “Well, take my belt,” and I loosened it. I could

(Testimony of John Wilbur Ward.)

not get it off; and he took it off and was standing there with it when Captain Thomason came up. I told him to call for Captain Thomason, that he was in the crowd.

I was carried down on a litter into the baggage-car.

Q. I will ask you, while you are feeling that way, to show the jury your leg.

Mr. GORTNER.—Objected to as incompetent, immaterial, and constituting a dramatic exhibition that is not proper in a jury trial, not susceptible of cross-examination, not throwing any light on this case, but merely for dramatic effect.

Said objection was overruled by the Court; to which ruling the defendant, by its counsel, then and there duly excepted.

Exception Number Thirty.

(Witness leaves stand and removes trousers.)

The WITNESS.—It is wood; all artificial limbs are made of wood around there. (Indicating.) This artificial limb which I have here admits of motions that way, but it [94] doesn't admit of the motion that way (indicating). As the result of this injury I was confined in the hospital eleven and a half months.

Q. I will ask you whether or not this injury affected your standing in the army.

Mr. GORTNER.—Objected to as immaterial and irrelevant.

Said objection was overruled by the Court; to which ruling the defendant, by its counsel, then and

(Testimony of John Wilbur Ward.)

there duly excepted.

Exception Number Thirty-one.

A. Yes. Closed my career in the army. I was thirty-five years old when this thing happened.

Mr. COTHRAN.—If your Honor please, and counsel for the other side, I have here a copy of the American table of mortality. Under our State law, the Court may either require proof or take official cognizance of any standard table of mortality, as to the expectation of life. This is a copy printed.

Mr. GORTNER.—It will be objected to as incompetent, irrelevant and immaterial, except in a death case. I don't object, though, to the secondary evidence, so far as that is concerned, but I do object to the proposition as immaterial in this case.

Said objection was overruled by the Court; to which ruling the defendant, by its counsel, then and there duly excepted.

Exception Number Thirty-two.

Mr. COTHRAN.—The expectancy was 31.78 years life from [95] the age of thirty-five, the expectancy of life.

Q. Captain, do you know the age at which officers of the United States army are retired?

Mr. GORTNER.—Objected to as purely speculative.

The COURT.—A matter of law. They are retired under an Act of Congress. You may answer.

Said objection was overruled by the Court; to

(Testimony of John Wilbur Ward.)

which ruling the defendant, by its counsel, then and there duly excepted.

Exception Number Thirty-three.

A. It is under act of Congress. At sixty-four years of age. I was receiving a salary of twenty-four hundred dollars a year, besides allowances, and so forth.

Q. Captain, just state to the jury the order of promotion that you would have been permitted to enjoy had you remained in the army.

Mr. GORTNER.—Objected to as entering the realm of speculation and conjecture; incompetent.

Said objection was overruled by the Court; to which ruling the defendant, by its counsel, then and there duly excepted.

Exception Number Thirty-four.

A. The promotions in the army are made by act of Congress at a certain time.

Mr. COTHRAN.—Just state what it is; the fact, that is what I am calling for.

Mr. GORTNER.—Objected to as not the best evidence.

Said objection was overruled by the Court; to which ruling the defendant, by its counsel, then and there duly excepted.

Exception Number Thirty-five. [96]

A. The promotion of second and first lieutenant and captain, major, lieutenant-colonel, colonel, are all

(Testimony of John Wilbur Ward.)

by law. From the colonels the generals are selected, and with each promotion there is an increase of pay; also with the years of service; there is a ten per cent increase of pay with every five years of service up to twenty years. There is an allowance in money, when an officer is not living in a military post and furnished a house. According to the different ranks he gets a certain money allowance. That is all by law. And he also gets his fuel, light bills paid, but that is not commuted in money; and there are several privileges, but no other ones commuted and paid in actual money. I was promoted captain, while I was in the hospital my vacancy occurred, and under the law I was promoted.

Q. Have you made a computation based upon the statements which you have just given of the amount of money you would have earned by the fixed rule of promotion to the age of sixty-four when you would have been retired?

Mr. GORTNER.—Objected to as incompetent, irrelevant and immaterial, invading the province of the jury.

Said objection was overruled by the Court, to which ruling the defendant, by its counsel, then and there duly excepted.

Exception Number Thirty-six.

A. I made the computation in my rank as Captain, and it amounted to a hundred and six thousand dollars up to the date of sixty-four years of age. I didn't consider my promotion [97] to a major,

(Testimony of John Wilbur Ward.)

which would have occurred in a certain length of time, because I couldn't tell the exact date when it would occur. I could only tell about when it would occur, so I didn't consider my promotion. I made it at my present actual rank, and it amounted to that amount, a hundred and six thousand and some odd dollars. [98]

Cross-examination.

(By Mr. GORTNER.)

At the time of this accident, I was a first lieutenant and my pay was twenty-four hundred a year; two hundred a month. After being hurt, and while in the hospital, I was promoted to be a captain, and now hold and held that rank. I was retired on captain's pay. That is one hundred eighty dollars a month. I draw that during the balance of my natural life, three-fourths pay—pending good behavior.

I say the crowd was always orderly and quiet, as far as order went. There was absolutely no movement in the crowd up to the time the train came in. I said the crowd from where I was to the south, as far as I could see was very thick. I could readily see up to the front of the waiting-room, because there was a certain amount of light shining out of the doors or windows, or something down there. Beyond that point where the light was, I couldn't see any part of it. I was where the crowd thinned out. To the south of me they were standing packed, you may say; they were not packed to the north of me; south, in the front or rear. It was some little period before the train was due, that I stood and talked with Cap-

(Testimony of John Wilbur Ward.)

tain Thomason along over on the westerly side of the house track, being the upper track on the plat. I suppose it would be approximately ten or fifteen minutes that I remained out in that vicinity, out on the edge of the crowd. It could not be any less than ten anyhow. Then as the time for the train's arrival [99] approached, Captain Thomason and I stepped across the freight track and stopped in a place between the freight and passenger track, I would say, near the center of that space, possibly a little closer to the freight track. By the freight track, I mean the most westerly of the tracks shown on the map, the one nearest the station; and the one nearest the top of that plat as it stands.

I don't remember of our saying anything about it at all, but personally I stepped over there as I thought it would be in a convenient position to board the train when it stopped, and I stepped over there at the time because it was easy to pass through the crowd at that point. I don't know that any individual pushed me under the train at all. I don't know whose body was in contact with me when I fell.

I don't think the shock of the accident knocked anything especially out of my mind that I had in it, but the action was so swift right at that time that I couldn't tell very much about it exactly; that is, I don't know whether I could furnish any details as to the matter further than I have and how it happened. I didn't anticipate any movement of the crowd such as ensued. I thought the train would come in as usual and stop, and everybody would get

(Testimony of John Wilbur Ward.)

on, but it didn't come in that way. I thought the crowd would wait until the train stopped before moving.

I don't think, if I had anticipated any lack of control in that crowd of soldiers, I could have assumed command of them, and held them in line, because the officers in the army are especially cautioned not to infringe on the rights of soldiers beneath their rank; and in a case like this, a [100] soldier not being on duty, has the rights of any other citizen, and any officer that undertook to marshal soldiers so that he would have the precedence to get through the crowd would be subject to trial by court-martial and be dismissed from the army. I could not, on anticipation that they might hurt themselves, have caused them to stand at attention, or appointed a provost guard to hold them in line. It would have been distinctly an infringement on their rights. If I had seen anything to indicate a necessity of policing that crowd myself, or any citizen or officer, I should judge, could undertake to do such a matter.

Q. Being right on the ground there yourself, you saw nothing prior to the time the train was opposite the crowd that indicated that they would be indiscreet or out of control?

A. I saw nothing at all to make such an indication, and I noted or heard, neither noted nor heard anything to lead me to believe that such a matter as a crowd rushing for the train, or rather for a position to get on the train was going to occur, for the fact that I didn't think the train was going to stop there,

(Testimony of John Wilbur Ward.)

and that was the—the crowd, as the engine passed me, absolutely never moved. I don't believe there was a man in the whole crowd boarded the train until it stopped.

If the crowd had not surged and pushed me, I was in a position where I would have been entirely safe, the way I understand it. I think the surging and pushing of this crowd was incidental to the main reason in putting me under the train. Personally, I think the main reason, from my [101] observation of the effect had on the crowd, was the more than ordinary speed that the train came in the station, and then when it went to stop after everybody thought it was going to pass, that is what caused the great surging, in my opinion.

If there had been no crowd there, I would be perfectly safe in my own position and in the initiative on my own part left me that way. I do not recall a teamster of the regular attempting to board the step of the car and striking me with his leg. I wouldn't say it would not happen, but I would state that I was not close enough to be struck by the leg of any man attempting to board a car up to the state—as far as my knowledge went, up to the time Captain Thomason and I were—the crowd made this motion.

After Captain Thomason and I were separated, it is evident that I was close enough to the train to go under it when I fell. I don't know at any time how close I was to the train at the time I went under. I couldn't state because there was no distinct pause on my part. The motion was continuous, and I

(Testimony of John Wilbur Ward.)

judge it took up a very short space of time until I was under.

My feet did not go under the train more than my body did; my opinion of it is that my entire body was under the train. I went under kind of headforemost. I struck on my right arm and shoulders. Nobody pulled me out. I got out of my own initiative. It is not the case that two National Guard men took hold of my shoulders and lifted me out from under the wheels. I got out from under the train [102] before it stopped—some time before it stopped, it seems to me. I know it kept on going after I went under and got out. I would be unable to state how far it kept on going after I had gotten under and gotten out; but I sat there alongside of the track and the train passed by, and it seemed an awful long time.

I didn't see any of the men about me try to get on the steps of the train or any of the cars; didn't see anybody reaching up towards the steps, toward the handle-bars; I didn't see any steps of the cars. I don't know whether I was injured by the front trucks or rear trucks of a car. I couldn't say, when I fell, whether I fell under the middle of a car or between the rear trucks of one and the front trucks of another. I didn't have an opportunity of noting such a matter. I went under and all my attention was on the part of rolling out again.

I don't know who it was that caused me to fall down. I went kind of headforemost. My feet didn't go out from under me in the sense of slipping

(Testimony of John Wilbur Ward.)

feetforemost, or anything like that. As I fell, my left *front* was kind of towards the car, and my head in the direction the car was going.

I did not see any group of soldiers coming toward the train from the west as the train was slowing down. That was a very dark night, and a very dim light there, and I could not have seen them for any distance, that is, before they reached the crowd, that is, if I had been standing facing in that direction.

Q. Well, the thing is simply this, that you were there in [103] a safe place and that as the train was going by there was a sudden and unexpected rush of the crowd and you were caused to fall and got your right leg under the wheel. Is that right?

A. That is probably the way it is. My leg was run over as I was getting from under the car.

Plaintiff rests.

Mr. GORTNER.—The defendant at this time moves the Court to grant a judgment of nonsuit, on the ground that there is no proof establishing or tending to establish any negligence on the part of the defendant company.

On the further ground that there is no proof establishing or tending to establish any negligence on the part of the company defendant which directly or proximately contributed to or resulted in the injury to Captain Ward, the plaintiff.

On the further ground that the proof affirmatively establishes that the injury sustained by the plaintiff was directly and proximately caused by the act of some third person or persons over whom the

(Testimony of John Wilbur Ward.)

defendant had no control.

On the further ground that the proof affirmatively establishes that the plaintiff himself failed to exercise ordinary care or caution for his own safety, and thereby directly and proximately contributed to the happening of the accident.

Said motion was denied by the Court; to which ruling the defendant by its counsel then and there duly excepted. [104]

Exception Number Thirty-seven.

Testimony of John Edwards, for Defendant.

JOHN EDWARDS, a witness produced on behalf of the defendant, having been first duly sworn, testified as follows:

Direct Examination.

(By Mr. GORTNER.)

I am a civil engineer, an employee of the Southern Pacific Company. I prepared this plat, marked Defendant's Exhibit 1, from measurements taken by me on the ground of the station, tracks and other physical features at the Paso Robles station as depicted on this map. I made the measurements myself, personally. The map is an accurate representation of the physical features that it depicts.

I was present on October 18, 1912, a little less than a month ago, when Mr. Arion Putnam, a photographer, was at the station there. I saw him take views of the premises. The position of the camera is noted by the different views. They are marked in series, view 1, 2, 3, 4, 5 and 6. I have examined these six photographs handed me and marked on the

(Testimony of John Edwards.)

lower corner of those views, 1, 2, 3, 4, 5 and 6, corresponding with the positions that I have fixed for the taking of the pictures on my plat; those numbers are correctly marked on the corners of the photograph.

View number 1 was taken from this position, practically opposite the baggage-room. This is the Paso Robles depot, so marked. The first track, in railroad parlance called the house track that comes close to the freight platform; that is alongside of the depot. The next track [105] is the main track; and the next track to that is the passing track. The next track is called the corral or stock track. I have marked those tracks that way on my plat. The view, number 1, was taken from a position east of the corral track, and almost directly east of the baggage-room door; a position east of all the tracks. The camera was pointed northwest.

Said photograph offered and received in evidence as Defendant's Exhibit View 1.

The WITNESS.—View 2 is taken between the house track and the main track, almost directly opposite the north end of the freight platform. The camera is pointed in a northerly direction. This is the water-tank here. (Indicating object in center of photograph.)

Mr. GORTNER.—None of those lights indicated in view 2 were there at the time of the accident.

Said photograph offered and received in evidence as Defendant's Exhibit View 2.

View 3 was taken from the same point and look-

(Testimony of John Edwards.)

ing northwest also, but slightly more to the northwest, so as to take in the front of the depot.

Mr. GORTNER.—It may be stipulated that none of those lights shown there were shown there at the time of the accident.

Said photograph offered and received in evidence as Defendant's Exhibit View 3.

The WITNESS.—View 4 was taken from a point midway between the house track and the main track, further to the [106] north, looking southerly between the main track and the house track.

The COURT.—The jury will not accept these photographs as to the lights at the time of the accident. With that understanding they may go in.

Said photograph offered and received in evidence as Defendant's Exhibit View 4.

The WITNESS.—View Number 5 was taken from the same position as number 4. The camera was pointed in a westerly direction, taking in that country out to the west of the position that the camera occupied.

Said photograph offered and received in evidence, subject to same stipulation as View number 4, as Defendant's Exhibit View 5.

The WITNESS.—View number 6 was taken from a point just opposite the position of the views 4 and 5 and directly between the rails of the most westerly track, and the camera was pointed southerly toward the depot.

Mr. GORTNER.—I will withdraw the offer of this exhibit until I have made further proof.

Testimony of Albert Hood, for Defendant.

ALBERT HOOD, a witness produced on behalf of the defendant, having been first duly sworn, testified as follows:

Direct Examination.

(By Mr. GORTNER.) [107]

My name is Albert Hood; am an employee of the Southern Pacific Company, a conductor; have been a conductor of the company about fifteen years. I was in charge of train number 10, the Sunset Express, on the night of October 8, 1910, when Lieutenant Ward was injured. I had been on that run, I think, about three years. I know where at the Paso Robles station was the regular and usual stopping place for passenger trains southbound.

On the night of October 8, 1910, train number 10, by which Captain Ward sustained an injury, stopped in the usual regular place. I was present at Paso Robles when counsel for defendant and Mr. John Edwards were there, and Mr. Arion Putnam, a photographer, on October 18, 1912, about a month ago. At that time I was there in the afternoon when a passenger train came southbound and stopped at the Paso Robles station, and saw it stop. That passenger train stopped just the same, the regular, ordinary stop. That train on the afternoon of October 18, 1912, stopped just about the same place that my train had stopped on the night of October 8, 1910. I was present when a photographer took a picture of that train, standing at the place that it had stopped on the 18th of October, 1912. That train of which

(Testimony of Albert Hood.)

the picture was taken in my presence, last October, was a passenger train and the other was a passenger train, but the equipment was not just exactly the same. There was not quite as many cars on that train of this last October, but it stopped in the same relative place.

Mr. GORTNER.—We offer in evidence now this view 6. [108]

Mr. COTHRAN.—I believe that was specified about the lights.

Mr. GORTNER.—Yes. That will be the understanding.

The WITNESS.—On the night that Captain Ward was injured, I saw him on the stretcher, but not before he was carried away. I understood he had been moved, but I didn't see him moved. I know just about where he was when he fell. This is my picture in the middle of View number 1.

I saw Captain Ward on the ground, and picked him up from the ground—that is, the boys did. I saw him on the stretcher. They had taken the stretcher down there from the baggage-car and placed him on it. After they had placed him on it, they had not moved him materially. This position that I assumed in the photograph is the position that he was in at the time I saw him placed on the stretcher. In View number 3, that is also my picture, and I was occupying then the same position I occupied when View number 1 was taken.

(Testimony of Albert Hood.)

Cross-examination.

(By Mr. COTHRAN.)

Q. Captain Thomason, will you stand up just a moment? (Captain Thomason arises.) Do you remember that gentleman, Captain Thomason, there that night?

A. I don't—I have an idea that I saw him, but I couldn't say positively that I did. I had a conversation with a gentleman about sending a telegram, and possibly he is the man.

Q. Isn't it a fact that you didn't see Captain Ward at [109] all on the ground and that you wanted to start that train before any telegram could be sent and that Captain Thomason ordered you—told you that a man was on the ground and that you would have to hold that train until he could telegraph?

A. I don't remember it that way; no, sir. I did see Captain Ward on the ground, on the stretcher on the ground. I saw him on the asphalt, on the ground—the same thing. He had been moved away from the position where he fell, probably a little. I don't know where he fell, of my own knowledge.

Q. Where is the baggage-room located at that place?

Mr. GORTNER.—That is objected to as not cross-examination.

Said objection was overruled by the Court, to which ruling the defendant, by its counsel, then and there duly excepted.

Exception Number Thirty-eight.

A. The door of the baggage-room is right near the

(Testimony of Albert Hood.)

steps that go up on to the freight-house. Here is the freight-house (indicating on photograph), and here is the steps that go up on to the freight-house. The baggage-car door is right in here. The baggage-car would stop right opposite the car there. I don't know, but it seems to me there was two or three cars in there, but the one this way is right where that car is and the others extended up the other way and the rear end of the rear baggage-car was right here and the cars were up that way.

Our usual stopping place to stop our baggage-car is not opposite the baggage-room. The baggage-room is right [110] here. (Marks "B" on map.) The baggage-car is right here, right along here where we always stop, not in front of the door; up this way farther. I should judge the door of the baggage-car was stopped about here that night. (Marks on map.) That ought to be about ten or twelve feet—the beginning of that little platform, the steps down that way. There was a freight-car there that night, just about where that car is in this photograph here; right opposite the steps. We ran our baggage-car, the door, down opposite the freight-car. On any train the method of handling the baggage is just the same. There was room there for two trucks to meet each other between the tracks.

Testimony of G. L. Hammond, for Defendant.

G. L. HAMMOND, produced as a witness on behalf of the defendant, having been first duly sworn, testified as follows.

(Testimony of G. L. Hammond.)

Direct Examination.

(By Mr. GORTNER.)

I was at Paso Robles on the night of October 8, 1912, along about shortly after ten o'clock, in the evening. I saw this gentleman, Captain Ward, the plaintiff in this case, there at that time. I was there on a soldier's pass from Atascadero; was a member of Company A, signal corps, California National Guard. I saw Captain Ward get hurt; was within a matter of two or three feet of him when he got hurt.

When I came on to the depot platform, the asphalt [111] pavement, Simonds and I were together, walking down from up town; and it was rather cold there, so instead of sitting down we kept walking up and down the platform. And I noticed Captain Ward standing along by the incoming track, the track the incoming trains came on. And we kept walking up there—I guess we walked up two or three times—and I says, "Look at the army officer over there. I wonder who it belongs to?" Simonds said, "I don't know. I don't know whether he is first lieutenant, second or captain. I don't know." So we went along again, and I said, "It is a pretty good-looking fellow, anyhow," and, as we came up, I looked again and he stood there talking with a gentleman, a lady and a little girl, and he talked there with them for a matter of ten or fifteen minutes while we was walking back and forth. So after awhile they left him. Simonds and I kind of sidled up alongside of him to see who he was, and, as we did, I found out he was a lieutenant, by looking at his shoulder

(Testimony of G. L. Hammond.)

straps, the bars on his shoulders.

And as we were standing along there the crowd kind of commenced to collect. We could hear the train whistling in. So, I guess it was maybe a dozen or fifteen—they commenced to sidle along the track, as they will when a train commences to come in; and I stood here and Simonds stood there, and Captain Ward stood right about over there from me. And this Captain Thomason, I never saw him at all. I don't remember seeing him after he left him with this lady and little girl. If he came back again I didn't see him. And the train commenced to come in. Well, the crowd commenced to get thick [112] back there. I guess there was tier of three or four deep. And I said, "Let's get out of this, Simonds," and I commenced to push back. It was only about that far from the train. As I did, what did I see going by me was the car, and there was a fellow with a blue serge suit—I knew him by him driving one of the wagons down there at the camp. He was a teamster. He drove one day that I was on the kitchen detail. I was carting bread and he drove one of the wagons, so I happened to know him. And I could see him make a grab for those handle-bars, and I looked and saw the lieutenant standing like this, and something whirled him, and I kind of whirled around myself, and the first thing I heard is "crunch," and I said, "Good God! Simonds, Grab him."

And I made a grab for him, and so did Simonds, and as I did, his leg that was cut off was catching in

(Testimony of G. L. Hammond.)

the track, and the car didn't stop, Simonds said, and I thought they had; and I reached in quick and made a grab for his leg and dragged it outside, and as I did something hit me. I thought it was the leg. And my stomach commenced rolling over and I pushed to the outside of the crowd for a little while and when I come back he was lying on the stretcher, and Simonds had a tourniquet around here, that is, had his belt off, and had it screwed up and was holding on. And I could not get back in there. I didn't want to get back in there, anyhow; I was not feeling very good.

I think that this teamster came in contact with the lieutenant. He brushed by me and brushed by Simonds and I think he hit the lieutenant. [113]

As the train pulled in, the biggest crowd was down towards the depot. We were up a little ways farther up toward the entrance, where the train would come in; and I would not want to estimate. I could heave a guess. I should think there would be maybe forty or fifty. There was about two or three tier deep, and the space in between. Forty or fifty right around in a bunch, you might say. Altogether down around the depot there, there was four or five hundred, if not more.

My view of it is when the teamster had hold of the handles and hit the lieutenant, he went underneath the truck, and I don't think the train had got over ten or fifteen feet before it stopped. I am not accurate on that because I had other things to attend to about that time. We were trying to pull him out.

(Testimony of G. L. Hammond.)

I guess we didn't move him more than two feet.

I don't think the train was going by us at that time at the rate of eighteen or twenty miles an hour, because I don't think it went more than half a car-length after it hit the lieutenant and went by me. I don't know the name of the teamster. I saw him in the vestibule of the train afterwards. I said, "If you hadn't grabbed them hand-bolts, you wouldn't have knocked that man down." Then he started to cuss me and I didn't say any more. I shut up.

I didn't see Captain Light there that night. There were others outside of this teamster trying to board the train there. The only thing I can describe was that the train was coming in, as the train came in, why it was coming along, [114] and a few of them grabbed them handles, and I saw the teamster make a grab and he hung on to one of the handles, first with both hands on one, and there was somebody had hold of the other one, and he stood back and let this fellow get hold. I was kind of looking to see him going along and dragging and hitting each one of them, and I think he hit the lieutenant. Now, I am pretty positive that he hit the lieutenant. I wouldn't say for sure, but I think he did, because it was done as quick as that, gentlemen, and I am doing the best I can to give you what testimony, what I think it was and what I think I saw at that time.

I think one wheel *when* over the lieutenant. When he was down—he went down so quick. He made an exclamation, "Oh, my God!" and I said to guard

(Testimony of G. L. Hammond.)

him, "For Christ's sake! Grab him, Simonds; there is a man down there"; and I grabbed him and at the same time Simonds was ready to fall too; he said he was stumbling at the time. I grabbed hold of him and started to pick him up and Simonds said, "Get the rest of it," and I reached in and grabbed that leg, and reached down, and it hung, by either his legging or by the flesh, I don't know which. Simonds took hold of him to drag him out.

Cross-examination.

(By Mr. COTHRAN.)

I do not know the first name of Mr. Simonds; he is here to answer for himself. I don't know his business. At that time, I was a corporal of the signal corps of the California National Guard. Mr. Simonds is a member of the National [115] Guard also; at that time he was a soldier in the army. I am a painter and paper-hanger, and reside at Santa Barbara, California.

I have talked with the attorney since we have been here. I guess I have talked with someone else before I talked with the attorney about my testimony. It is quite common talk amongst the army for the last two years. They did not come to interview me shortly after the accident. I did volunteer my information to the company against a fellow army officer, if you want to take it that way. It is in the affidavit that I gave them that I *saw* the Southern Pacific that this teamster seized the handle bars of that moving train. I have forgotten what that

(Testimony of G. L. Hammond.)

gentlemen's name was that I saw who received this affidavit from me.

Mr. GORTNER.—S. V. McClure.

The WITNESS.—I made that affidavit somewhere about a year ago last August; went voluntarily and made that affidavit. I think the night of October 8, at the station, 1910, was not a very dark night. I was not hunting for moons, so I couldn't tell you if there was any. I think there was one light right close to the station. I think the light was just about where that corner light shows now, somewhere right around the depot, that night, so that when you looked up the track, why you could see what was up there; you could see about maybe seventy-five, eighty or eighty-five feet. If a man were a hundred feet away, perhaps you couldn't have told whether it was a man or a woman.

At the time of the accident, I stood—I should say — [116] well, just opposite the—if you were near the corner of that building and looked right, just about across—well, I should say somewhere just back of where that coach is stopped right in here (indicating), maybe seventy-five feet from the north of the station. I was not standing a hundred feet north from the station when the train came in.

I don't know the teamster, not by name. Only knew that he was a teamster employed there driving a team for the Government. I have never seen him since. I don't know whether he is around here now. He may be. I don't know if I would know him if I saw him. I have not seen him around here with the

(Testimony of G. L. Hammond.)

attorney or among any of these witnesses for the Southern Pacific. In that excitement, in that crowd, I could state that this man had on a blue serge suit, because when he went by me, I had seen the fellow, had ridden with him during the day, the same day before we had gone out, and I afterwards saw him on the vestibule and talked with him. I said, "If you had let them hand-bolts alone, you would not have knocked that man under the train," and he turned on me and was going to pick a fight then and there, and I thought there was trouble enough, and kept quiet. I saw this teamster when he grabbed the hand-holts. I had been with him in the afternoon, previous, riding with him, on one of them army transport wagons. I couldn't pick out the particular spot. We were riding back and forth from up the camp, down around the bakery. I know he had on a blue serge suit that night, simply because I saw him when he had it on, saw him in the vestibule; saw him in the day and saw him at night, too. [117] If you had seen a man with a blue serge suit mixed up with a mess of soldiers with khaki uniforms on, I guess it wouldn't be very hard to tell it. I couldn't tell you what the color of his hair is. He was a man, I should say, about five feet, seven or eight or nine; I should think, somewhere around twenty-two, twenty-three or twenty-four years of age. I think the man would weigh a hundred and forty-five pounds. If I remember rightly, I think he had sort of dark hair; he was not a positive blond nor a positive brunette, kind of betwixt and between.

(Testimony of G. L. Hammond.)

I saw Captain Ward talking with this lady and little girl about in that spot right there. (Witness marks with a cross.) I should think they were talking there some few minutes, for I know that I walked up and down the track there I should say a couple or three times. I was not keeping tabs on this man's behaviour or movements. I had nothing else to do, and was just glancing around, keeping my eyes on whatever they would light on. I think it was somewhere along about between half-past ten and a quarter to eleven I saw him talking with the lady and a little girl.

Q. Captain Thomason, will you stand up, please? I will ask you, didn't you see him standing with that gentlemen there during that period, half-past ten to eleven or a quarter to eleven? (Indicating gentleman standing.)

A. I don't know whether that was that gentleman or some other gentleman. He stood there talking with a gentleman, a lady and a little girl. I saw him standing there alone with this gentleman there, without any lady or little girl [118] before the train came in. I didn't see him standing there for twenty-five minutes with this gentleman alone, without any lady and little girl. He was talking with a lady and little girl—if this was the gentleman that was there, why it is all well and good; I can't recognize him. They were standing at this time when I saw this lady and the little girl and the gentleman, just before the train came in in the same place I have indicated. They went back and forth across the track there once,

(Testimony of G. L. Hammond.)

back up towards that—there was a line of posts up in there, and then went back again. I was not keeping tabs on this man's movements.

When I first saw them, they were standing by the main track, and I walked up and they went from my view; of course as I went by them I couldn't look out of the back of my head. They did not continue to stand there until the train came in, in the same place. When I came back once they were gone, when I came back, but he stood there with this gentleman. Where this lady and little girl went I don't know, whether they went across the track, or went the other way.

Testimony of A. Putnam, for Defendant.

A. PUTNAM, produced as a witness on behalf of the defendant, having been first duly sworn, testified as follows:

Direct Examination.

(By Mr. GORTNER.)

I am a photographer of the firm of Valentine & Putnam, [119] in Temple Block. I am the photographer that took the views here marked views numbers 1, 2, 3, 4, 5 and 6. 5 and 4 are made from the same place one looking down the track and the other looking across, I think, although whether there is any space in between there, I can't quite be sure. They substantially come together and show practically one continuous landscape; number 5 looking westerly and number 4 being looking southerly from the same point.

Testimony of L. C. Littlefield, for the Defendant.

L. C. LITTLEFIELD, a witness produced on behalf of the defendant, having been first duly sworn, testified as follows:

Direct Examination.

(By Mr. GORTNER.)

I live at Paso Robles; am a stationary engineer; not connected with the Southern Pacific Company. I lived at Paso Robles in October, 1910; was at the depot on the night of October 8, 1910, when Captain Ward was hurt. I was not at the depot prior to the arrival of the train over ten minutes. During that ten minutes there were between three and four hundred at the depot. I did not see Lieutenant Ward before he was hurt to recognize him; did not see him at the time of the accident.

I saw the train come into the depot. It came down as far as the water-tank and shut off and came in as it usually does, at a very moderate rate of speed, and slowed down and [120] stopped at the usual place. The train couldn't possibly be moving at the rate of eighteen or twenty miles an hour when the engine went past the waiting-room. I couldn't judge how fast it was moving at that time, but it came in as it usually does and slowed down and made the regular stop. When it came in, I was standing on or about the Paso Robles bus, somewhere within fifteen or twenty feet north of the electric light pole. There were electric lights there at the time, some electroliers have been put in since that. That was an electric arc-light, hung on this pole, somewhere

(Testimony of L. C. Littlefield.)

within fifty feet north of the waiting-room, suspended not over eighteen or twenty feet. I was to the north of that pole.

I saw somebody attempting to board the train as it was moving. I was down there with the intention of meeting my wife; she had been in the hospital in the city for something like three weeks, and she told me, she wrote me and stated she would be in on 24, and I went to 24 and she didn't come, and I didn't know but what she might come in on the night train; and I went down there with the intention of meeting her, and when the train came in I was watching the first two lighted cars that were lit up more than the rest, to see if there were any ladies rising to get out of the train, and as they pulled by, the soldiers made a surge toward this train to get on it, and I watched to see if there was any ladies to get off, and there was none. As I walked down, maybe fifteen or twenty feet, I didn't see there was anyone to get off, and I turned around, and as I came back, I heard someone make the remark that there was a man run over; and then they asked if there was a doctor in the crowd, and there [121] was a gentleman standing back of me came forward, and they made room for him to get in there where this gentleman that was run over was sitting. I stepped up to see, and he was sitting about the second—first truck from the front end of the third passenger-car, facing this way, facing the north. And they went in then and got a stretcher from the baggage-room and put him on to the stretcher and started towards the baggage-

(Testimony of L. C. Littlefield.)

room with him. I made the suggestion that if the train was going to camp and they had their own physicians there, why not put him on the car, which they did. That is as much as I know about it.

I think it was somewhere in the neighborhood of a hundred feet north of the station that I saw Captain Ward. He was about opposite the front trucks of the third passenger coach of the train. I had seen soldiers attempting to board the train; saw some of them succeed in getting on the steps as it was still moving. I could not answer honestly how many I saw climbing on to the steps while the train was still moving, because I didn't think of them. I saw them climbing up there and was wondering if there was any passenger going to get off.

The steps were filled in by them so that it would be impossible for a woman, if my wife had been on there, to get out. The train was still moving as they were climbing on. At that time it might have been moving a little faster than a man would walk. [122]

Cross-examination.

(By Mr. COTHRAN.)

The cars were all lit up; the cars in the rear of the train were all lighted, too, the sleepers, the Pullmans lighted; I am positive about that. I couldn't tell you how many cars were in that train. I didn't count them. Four cars were to the south of Captain Ward when the train stopped, mail-car, baggage-car, smoker and one chair-car; that is all the cars they had to the south of him. I couldn't say as to the

(Testimony of L. C. Littlefield.)

number of cars the other way. I think it was about a hundred feet to the north of the station where I saw him. I wouldn't specify it to say to a certainty.

I was employed by the Southern Pacific in the capacity of baggage and freight man at Paso Robles by the Southern Pacific from 1904 to 1907. I couldn't tell what kind of clothes these soldiers I saw trying to board the cars were wearing, unless they were in uniform. It was dark back north of this electric light; from the electric light south towards the platform it was quite light. These soldiers, when they tried to board the train, were standing about maybe thirty or fifty feet north of this electric light. Of course, they were scattered promiscuously around there, but the main body was somewhere within thirty to fifty feet north of this pole. They was scattered from the north of this light down that way towards the platform, and as the train came in they went with the train as it was going down and got on, or tried to get on. Some got on; not all of [123] them.

I did not observe the position of this man until after the accident. These parties that I saw trying to get on the train all started; that is, the majority of them; some of them didn't; some of them started and wanted to get on ahead of the rest. I cannot state how many soldiers I saw trying to get on. There may have been as many as two or three, and there might have been more. I didn't count them. I mean more than one tried to get on. Those that started for the train, I should judge. Well, I

(Testimony of L. C. Littlefield.)

wouldn't say how many there were, but there was a number of them that started towards the train to get on; some of them succeeded in getting on.

At the time I saw these things I was standing north—but just a trifle north of the hotel bus, Paso Robles hotel bus. About fifty feet north of the light pole, that would be something about a hundred feet north of the waiting-room. These soldiers were those who moved on down towards the south with the train and tried to swing themselves on. I did not see the plaintiff there at the time until after the accident. I would not say that any of these soldiers who tried to swing on the train did so more than a hundred feet north of the station. I was not interested so much in the soldiers as I was in my own personal affairs. For that reason in varying distances, I wouldn't make any accurate statement in regard to that, in regard to that matter. I was looking for my wife, and after I found she was not on the train I was not interested any more. [124]

These soldiers whom I saw trying to board this train, started in about where I first saw Captain Ward. I don't know whether any of them succeeded in getting on the train immediately opposite Captain Ward. I don't know whether they got on south of the place where Captain Ward fell or whether they got on north of the place where Captain Ward fell. I didn't see him fall. I could not say whether it was south of the spot where I saw him after he was injured, or to the north of that spot that I saw these soldiers try to board the train; I don't know.

Testimony of J. W. Doty, for the Defendant.

J. W. DOTY, produced as a witness on behalf of the defendant, having been duly sworn, testified as follows:

Direct Examination.

(By Mr. GORTNER.)

I am not at present connected with the Southern Pacific Company; am in the real estate business in Paso Robles. In October, 1910, I was working for the Southern Pacific Company in the capacity of section foreman at Paso Robles.

I was at the Paso Robles station or depot on the night of October 8th, 1910, and saw the southbound train, No. 10, come in along about eleven o'clock that night. It came in as usual, as it came every evening, and stopped at the usual place. They always shut off down about sixteen hundred feet, at the Thirteenth street crossing; the trains always [125] shut off steam there; and when they come up by the water-tank they are coming up at a slow-down, and come in and stop at its usual place. They most always did. When the engine passed the waiting-room it could not have been going more than three or four miles per hour. When it stops at its usual place, the engine would be about nearly a hundred feet—from eighty to a hundred feet from the depot, south.

I did not see Captain Ward get hurt. I saw him on the ground before he was moved away. That night or the next morning, I measured the distance from that spot to the corner of the depot. It was

(Testimony of J. W. Doty.)

about sixty feet. I saw him while they were tying the belt around his leg, and it was from that point that I measured to the corner of the depot, and that was sixty feet. I measured from where the blood was, the next day.

As the train pulled in there, I was up by the depot, near the waiting-room. There was just one arc-light there at that time; it was on the telegraph pole, about fifty feet from the depot. And it was on a crane, about sixteen feet from the ground—a crane reaching up and the light hanging under it. They have been changed since then.

As the train was moving along and before it stopped, I saw somebody trying to board the train. It seemed as if there were three or four different pairs of arms going up towards the handle-bars. As the train pulled in, I walked north, down the platform. Captain Ward was on the ground opposite one of the chair-cars. He was about fifteen feet, I should judge, from the fore part of the car, front part [126] of the chair-car. I couldn't say, when I saw men trying to board the moving train, any of that I saw, was with reference to the front of this same chair-car.

When I saw the men trying to board it, the train was probably moving four or five miles an hour; not over that. I should judge there was between four and five hundred people gathered there along the depot. There was different groups; they were in different parties. I had no trouble walking through them.

(Testimony of J. W. Doty.)

I saw Captain Ward before the accident. He was standing back just below the bus, the Paso Robles Hotel bus. That was, I should judge, about a hundred feet—hundred and twenty feet north of the depot; something like that. At that time Captain Ward would be about twenty feet from the main line. I think he was talking to a gentleman there when I seen him. I couldn't recognize Captain Thomason here. I seen Captain Ward several times. He was a slimmer man than he is now. I could recognize the face, but he seems to be stouter to me than he was at that time.

During the times I saw him he was walking around. I seen him up in the hotel grounds. He was pointed out to me at the hotel grounds. At the depot I seen him walking around the platform there quite a few minutes before the train came. That train was brought to a gradual stop that night. That was the same thing as the ordinary service stop, as far as I could see. [127]

Cross-examination.

(By Mr. COTHRAN.)

I could not recall to a minute what time it was when I first saw Captain Ward there. Somewhere about 10.30, I should judge. I saw him right along from time to time. I seen him talking with a gentleman, and I seen him walking up and down the platform. I couldn't say that I saw him talking with anyone else. I didn't see him talking with a little girl and a lady. I did not see him when he first came

(Testimony of J. W. Doty.)

there. I couldn't say positively as to how many feet he was from that depot when the train came in.

I was right to him the moment after he was taken out from under the wheels. I couldn't say how far he was carried along. This blood spot I measured was on the main line track, right by the side of the rail, right close to the rail, just outside of the rail.

I was section foreman for the Southern Pacific at that time. My duties were in reference to repairing the line along there. I worked during the daytime; didn't work at night. I had worked that 8th day of October, my usual hours. I was not in bed at this late hour, but down to that station, because there was quite a lot of sport going on there. I was there with the rest of them. The sport going on was up at the swimming-tanks. I went down to this station with the rest of the crowd just out of curiosity, probably.

I had worked for the Southern Pacific six years. It was probably one hundred and fifty feet away from the station [128] that I saw three or four pairs of arms go up, when the train was pulling in. I did not see any of them succeed in getting on the train. I did not see a man with a blue serge suit. I couldn't tell what kind of clothes they wore.

I did not see Captain Ward go down in the crowd. Probably my back was turned that way, for all I know. I could see these people trying to get on the train, because I was probably watching them to see who was getting on and off. I couldn't say that I had my back to Captain Ward; probably I had my

(Testimony of J. W. Doty.)

back to him when he went down.

When the train came around by the tank I was up by the baggage-room, by the waiting-room, and as the train pulled in I walked down the platform. The baggage-car stopped that night, probably half of the distance the length of the freight-car. The door of the baggage-car was opposite the freight-car. That was the usual way of stopping the train there to take off baggage.

This water-tank that I spoke of is something over six hundred feet to the north. I was not paying no attention to hear the application of the air in the triple-valve that distance, the rumble of the train. The train always slowed down at that point. I am just assuming that it did the same thing from the fact that it always did that at that place. The train was about ten minutes late that night. I don't know whether it was running on a regular schedule or a run-late order. I could not say whether he had a meeting point or not. He was probably running on schedule. It came in as usual. With reference to this Paso Robles depot, the [129] engine-head that night when it was stopped was just opposite the end of the platform. I know that fact, because I was there when they put the gentleman on the baggage-car. I went right down and looked at the engine, and know how many baggage-cars and cars there were. I don't know how many cars there were on that whole train. I think there were about nine or ten cars in that train. The length of one of these cars, I should judge to be about seventy-five feet.

(Testimony of J. W. Doty.)

The length of those premises from the corner of the station there of the waiting-room to the end of that platform is about ninety feet; about three rails from the waiting-room door to the platform. The baggage-car stopped probably sixty feet north of the waiting-room; something like that. I don't think there was any other car besides the baggage-car on that train, south of the baggage-car. I didn't think they carried a mail-car on that train. Probably the baggage-car was next to the tender, so far as I know. I think there was two chair-cars and a Pullman car. I did not notice how those cars were lighted that night.

It may be a usual fact when that train came in that the Pullmans would be darkened—people go to bed at that hour of the night who were in the Pullmans. I couldn't say. I have observed the back end of the train would be dark.

Redirect Examination.

(By Mr. GORTNER.)

The baggage-car, I mean to say, was sixty feet south of the waiting-room, past the waiting-room. If I said north [130] I made a mistake. A freight-car had nothing to do with the reception of baggage from a passenger train; as baggage from the passenger trains it would be handled on wheel trucks. A freight-car would not make any difference there at all. Thirteen foot centers there; five foot trucks; plenty of room between the trains. Plenty of room for trucks between the freight-car and the passenger train. The baggage carried by these trucks, after it would be taken off the passenger train would be

(Testimony of J. W. Doty.)

drawn back and put into the baggage-room, so the place where a freight-car would be would have nothing to do with baggage at all. [131]

Testimony of A. Hood, for the Defendant [Recalled].

A. HOOD, recalled on behalf of the defendant, testified as follows:

Direct Examination.

(By Mr. GORTNER.)

I am the same Mr. Hood whom Mr. Gortner promised to recall; was conductor of the train on this night. We made the regular ordinary stops that night; come in and slowed down and stopped at the regular place. The engineer generally shuts off down at the curve or between there and the water-tank, according to the speed he was running, and then slows down to the station. I don't know at what rate of speed the train was traveling on this night. I should think ten or twelve or fifteen miles an hour, probably. I should not think that a train coming along to within fifteen feet of the stop would operate over four or five miles an hour. There was nothing abrupt or unusual about the stop of the train that night. I, as a trainman, did not know that anyone had been hurt; did not pull any bell for an emergency stop. The stop, so far as I know, was simply [132] the ordinary service stop. I got off the train when it stopped; I generally get out on the front end of the smoking-car down about the curve, down about the whistling-post. I got off when it stopped, just as it stopped.

(Testimony of A. Hood.)

I was standing there and I could see by the head-light and by the light of the platform that there was quite a crowd of people there getting ready to get on as soon as they could, to get seats, as they always do when there is a crowd. I seen them squaring around and getting ready to get on the train. I didn't know that Captain Ward was hurt until we was all ready to go, the train was ready to leave; and then Mr. Thomason, I believe, over there, proves to be the man—I didn't know then, at the time, but it seems he told me there was somebody hurt. At the same time another man came up to me and said there was somebody hurt, and wanted to know if he could get the stretcher. Since I came here I found out who he was, too. The boys had got the stretcher and had Captain Ward on it before I got there, before I knew it. When the train stopped I went into the office for orders. The board was up, as I remember it. I went into the office and got an order from the operator. I had to read that and check it up and take a copy to the engineer, which I did before I knew that Captain Ward was hurt.

Then when I found somebody had been hurt, I went back to see what was the matter. When I saw Captain Ward there first on the stretcher I should judge he was sixty or eighty feet back of the platform; somewhere along in [133] there—sixty or eighty feet north of the depot. I couldn't tell which coach was opposite to him. I should think he would be about behind the first chair-car, probably about opposite the first chair-car.

(Testimony of A. Hood.)

Cross-examination.

(By Mr. COTHRAN.)

I have been on that run most of the time for three years, as I remember it. We didn't ordinarily, with the exception of the months of September and October, 1910, stop that train at Atascadero; but that train was scheduled to stop at Atascadero that night of October 8th, what we call a bulletin stop; and this train, the Sunset Express, ran between San Francisco and Los Angeles. The stopping at Atascadero made a little bit of difference in our time. It affected our whole schedule from there down.

Q. Were you on a run-late order that night?

Mr. GORTNER.—Objected to as immaterial.

Said objection was overruled by the Court; to which ruling the defendant, by its counsel, then and there duly excepted.

Exception Number Thirty-nine.

A. I don't remember what orders we had. We were not running upon a run-late order, we run upon a schedule or time-table that prescribes the number, class, direction and movement of a regular train.
[134]

Q. And you have a time-card that is your authority for the movement of regular trains, subject to special instruction?

Mr. GORTNER.—Objected to as immaterial.

Said objection was overruled by the Court, to which ruling the defendant, by its counsel, then and there duly excepted.

Exception Number Forty.

(Testimony of A. Hood.)

A. Yes, sir.

Q. This contains a classified schedule of your trains and is for the information of railroad employees and the Government, exclusively, isn't it?

Mr. GORTNER.—I object to it. I don't want to waste time.

Said objection was overruled by the Court, to which ruling the defendant, by its counsel, then and there duly excepted.

Exception Number Forty-one.

A. Yes. We were running upon a schedule that night, a little bit late, eight or ten minutes.

Q. What was the station at which you stopped before you reached Paso Robles?

Mr. GORTNER.—Objected to as immaterial.

Said objection was overruled by the Court, to which the defendant, by its counsel, then and there duly excepted.

Exception Number Forty-two.

A. San Ardo, I believe. The distance from San Ardo [135] to Paso Robles is, I think, thirty-four miles. I suppose we came up to the whistling-post between forty and fifty miles an hour. The whistling-post and the water-tank are not the same point. The water-tank, guessing at it, I should judge was two hundred and fifty yards; and the curve down there I spoke of is about as far again; somewhere about 1,800 or 2,000 feet.

(Testimony of A. Hood.)

Redirect Examination.

(By Mr. GORTNER.)

The whistling-post is a little farther than the curve. When the engineer whistles you cannot see the train; it has not come around the curve yet, but it is right near the curve. It is back there somewhere in the vicinity of that whistling-post, beyond the curve, that I say the speed was forty or fifty miles an hour.

Testimony of R. L. Coburn, for the Defendant.

R. L. COBURN, a witness produced on behalf of the defendant, having been duly sworn, testified as follows:

Direct Examination.

(By Mr. GORTNER.)

I am an employee of the Southern Pacific Company, a locomotive engineer; was a locomotive engineer in October, 1910; have been an engineer twelve years, for the Southern Pacific all the time. On October 8, 1910, I was the engineer running number ten, the Sunset Express, southward [136] through Paso Robles. We got to Paso Robles very close to eleven o'clock, between 10:55 and eleven o'clock; we were ten or fifteen minutes late. We passed the water-tank, two hundred and fifty, or such a matter, of yards north of the Paso Robles station, at a rate of speed, perhaps, twenty miles an hour. We slowed down commencing right from the water-tank; when the engine got opposite the waiting-room of the station we were not going over six or eight miles an hour. I stopped the engine that night about opposite the south end of the freight platform, ap-

(Testimony of R. L. Coburn.)

proximately; just about the same place I usually stop. There would not be a variation of but a few feet at any time. I did not make an emergency or abrupt stop of any sort.

I did not hear or know or understand that an accident had happened and stop on that account. My speed was the usual speed. Fifteen feet before coming to a standstill at that sort of a stop my train would be going not over four miles an hour. There was no one on our main line track in front of the train as we came into the station that night. I saw a crowd there; they were several feet back; no one nearer than six or eight feet to the main track as I came in.

I did not run past any part of that crowd at the rate of eighteen, twenty or twenty-five miles an hour. I was not going over ten miles an hour at any point passing any of the crowd, and slowing down as I approached the depot. There were ten or eleven cars on that train; [137] I wouldn't say positively which. They were the express, baggage, smoker; the usual make-up of number ten was the express, baggage, smoker, two day coaches and the rest were sleepers and the observation-car. The chair-car was called a day coach, two chair-cars.

Cross-examination.

(By Mr. COTHRAN.)

We had an electric light on the head of that engine that night. On a straight, level track it will light up half a mile, at least a good light for a half a mile. We could see clear down practically to the station,

(Testimony of R. L. Coburn.)

after we rounded the curve. My position was on the right-hand side of the cab next to the depot, going south. We did not have an unusual number of cars that night on that train, the usual train. We had not been accustomed to stop at Atascadero previous to September during that year, with that train.

Mr. GORTNER.—Objected to as immaterial.

The COURT.—He has answered the question.

To which ruling of the Court, the defendant, by its counsel, then and there duly excepted.

Exception Number Forty-three.

Before we got to the water-tank we were going the maximum speed between stations; before approaching Paso Robles, going perhaps forty-five miles an hour. It was already slowed down reaching the water-tank, to a speed of twenty miles an hour. That track is slightly up-grade [138] going south; it is not a mountain grade, but it is considerably up-grade. It is a grade that we would have to pull up a little bit, keep the steam on, the cars wouldn't run from the momentum without steam there. When we had slowed down so that we were about twenty miles an hour we were six or seven hundred feet from Paso Robles station. You can stop a train containing that number of coaches running at twenty miles an hour in two hundred feet. You could have stopped that train in two hundred feet.

When I looked out of the cab I saw a big crowd around there. When that engine passed that crowd at that station, we were going, in my judgment, as much as eight or ten miles an hour. That is our

(Testimony of R. L. Coburn.)

usual way of going at that place. We had no special instructions with reference to slacking our speed there on account of the different crowd. We always use care where there is a crowd. There was no run-late order. We were about fifteen minutes behind time at that point. We were not trying to make up this speed. We have a regular schedule that we were running upon from south of Atascadero to Los Angeles. I expected to preserve that tardiness all the way through.

It would be pretty hard to state where I made the last application of air before reaching Paso Robles. We use air on curves to some extent. Our train line was broken last before reaching Paso Robles at San Jose, but I can't recall where I made the last application of air. [139]

Q. Do you know what time you left Salinas that night?

Mr. GORTNER.—Objected to as immaterial.

Said objection was overruled by the Court, to which ruling the defendant, by its counsel, then and there duly excepted.

Exception Number Forty-four.

A. I couldn't say positively. We were making just about running time, and were from ten to fifteen minutes late out of San Ardo, which is about thirty-three miles from Paso Robles. I could not state precisely what time we left San Ardo that night.

He has not asked me a lot of questions about this case, how I worked that engine there that night. There is no one in the employ of the Southern Pacific

(Testimony of R. L. Coburn.)

in the law department that asked me a lot of questions concerning this matter. I was not in Mr. Gortner's office but a few minutes, just that one time, that is all. I did not tell him all that I would testify here before I came on the stand to-day.

Mr. Gortner asked me how fast I was running and I told him; and that is about all there was to it. He asked me if I saw the accident and I said I didn't see it.

G. T. Mulvaney, a Witness for the Defendant.

G. T. MULVANEY, produced as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. GORTNER.) [140]

I am a fireman, working for the Southern Pacific Company at present; was working as fireman two years ago along with Engineer Coburn the night that Captain Ward was injured at Paso Robles. Prior to that I had been a fireman a short while over five years, I believe.

I should judge the speed our engine and train came past the water-tank that night was something between twenty-two and twenty-three miles an hour. I saw a crowd ahead of us along on the station grounds in that territory to the right. None of them were on the main track in the path of our engine; they were up close to the main track, though. I don't think there was anyone on the track. From the time of passing the water-tank the engine and train slowed down considerable. When we began to

(Testimony of G. T. Mulvaney.)

go past the crowd, I don't think that we were going over eight or nine miles an hour, and as we passed the waiting-room in the depot, we were not exceeding five miles an hour. The engine stopped at about the usual stopping point at the depot at Paso Robles, about the south end of the freight platform. That stop was not made on an emergency bell or any signal, it was a regular service stop. I had no knowledge as a trainman that any accident had happened; did not cause the train to stop because of any accident. We made a service stop. Fifteen or twenty feet before it stopped, we could not have been running over two miles an hour. I got off of the engine and went back to the seat of the accident. Just about the time the train stopped I got down on the step, and I went back to the [141] telegraph office to send a message to the superintendent in regard to a light out of the block signal over around San Mark, somewhere, San Miguel or San Mark, I don't remember just exactly where it was. I just about had the message made out when a man came up to the ticket office and he spoke to the clerk and told him to hurry and get a doctor, somebody got his leg cut off. It surprised me to such an extent that if it was possible for an accident to happen, when we went into that depot at such a slow rate of speed the way that was, below the normal speed, that I run outside and saw this man, I believe it was (indicating the defendant), lying there on the ground alongside of the truck at the time.

By truck I mean a set of wheels; if I remember

(Testimony of G. T. Mulvaney.)

correctly it was about the head of the second chair-car. There were two chair-cars there, and there was a smoker in front of that; there was no other coach between the smoker and chair-cars. The train was made up with an engine, two baggage-cars, had an express and baggage, then a smoker, then two chair-cars, and then Pullmans. And it was about near the front of the second chair-car that I saw him lying on the ground. He could not have been over two feet away from the truck when I got up there, or in fact when I first looked at him it appeared to me as though his foot was still between the wheels, very close to it.

I don't know whether they had tied his leg up at that time. There were a number of men standing around [142] there, and he appeared to be in a sitting position, and whether they had tied his leg up, up to that time or not, I don't know. I was on the left-hand side of the cab, of the engine, as we went into the station and didn't see the accident at all. That was the first I knew of it when I was in the depot, in the office, after getting off of the train.

Cross-examination.

(By Mr. COTHRAN.)

When orders are given by train-dispatchers for the running of an engine or a train, those orders are also within the knowledge of the fireman. I do not remember receiving any orders from the company in reference to running that train that night. As far as I remember, we were running on regular schedule; we were fifteen minutes behind time of that sched-

(Testimony of G. T. Mulvaney.)

ule, something to that effect. I don't remember that we were trying to make up the time on that schedule, in fact. The train was so heavy and the time on that run is exceptionally hard to make, and it is almost impossible to make up time when you do get late. It is a custom of engineers and conductors to make up time on a regular schedule if they possibly can, unless they have a run-late order. They undoubtedly might have been trying to make up the time, but, as I say, it is an impossibility on that run.

That was an oil-burning engine. I was pretty free to observe things down the line, myself. I sat on the side away from the station at Paso Robles; saw quite a [143] crowd. I first noticed that crowd just as we came by the water-tank. I judge the speed we were running when we came by the water-tank was along about twenty to twenty-two miles an hour—twenty to twenty-three miles an hour; just about that rate of speed. It is almost impossible to judge the exact speed. There is nobody can estimate absolutely. I wouldn't say that there is not any. I have no doubt that there is a good many men that are a great deal more efficient than I am judging speed. Unless you made calculations or knew the distance and so forth, or had some absolute method, I don't think you could tell it except from your own general experience. My best judgment is that we were making between twenty-two and twenty-three miles an hour when we passed that tank. When the head of the engine first came within the station platform premises the speed at which we

(Testimony of G. T. Mulvaney.)

were running was about eight or nine miles an hour; they might have been as much as ten at that time. I hardly think they were running quite that fast.

If I remember correctly, just as we got on to the curve, before we got to Paso Robles, there had been a reduction made, and then they were released and after we shut off steam. We carried a hundred and ten pounds of air on that train. I don't remember exactly how many cars were there on that train. I haven't any method of knowing, except that I would judge there were ten or eleven cars. The train at that time, I believe, used to [144] run in ten or eleven cars. I have not been in the company's law offices and made a number of statements about this case; haven't ever detailed to the company what I would testify to.

Redirect Examination.

(By Mr. GORTNER.)

I believe I was in the office of Mr. Gortner Monday afternoon; just a few minutes was all. The only conversation that I remember, he asked me if I had seen the accident and I told him no. And he notified me to be here at the Federal Court Building at ten o'clock yesterday morning.

If I remember correctly, I told him that we come in there, if anything, below our normal speed.

Testimony of P. H. Ginochio, for the Defendant.

P. H. GINOCHIO, a witness produced on behalf of the defendant, having been first duly sworn, testified as follows:

(Testimony of P. H. Ginochio.)

Direct Examination.

(By Mr. GORTNER.)

I am employed as brakeman by the Southern Pacific Company; was one of the brakemen on train ten running to Paso Robles, south-bound train, October 8, 1910, the night that Captain Ward was injured. I was rear brakeman; was riding on the steps in the head-end of the observation car on the train as we came down towards Paso Robles. [145] The observation-car was the tail-end car of the train. I was on the steps of the front end of that. As the train come down toward Paso Robles and got so that the engine would be about at that water-tank, I would judge it was going about four or five miles an hour. I was not on the steps then. I was on the steps before the engine got opposite the station. I don't know how fast it was going, the engine, at the time it passed the water-tank.

I got off that train before it stopped. When the train came to a stop, I was at the rear-end of the observation-car, on the ground. I got off at the head-end; had no difficulty in getting off of it. I couldn't say exactly the distance from the station, but it was, the rear-end was two or three hundred feet from the station. I know where the train usually stops. I think I had been between four and five months on the same run. Our train did not stop in any different place from what it usually stopped.

When I got off the front end of that observation-car, about a car-length before the train stopped, it was going about four or five miles an hour. It

(Testimony of P. H. Ginochio.)

came to a regular service stop after that.

I was northward of all this crowd. I did not go down into the crowd to see it; didn't see anything about the accident; my object in getting off the train, that is the rule to get off and be ready to flag, to protect the rear-end of the train; I had my red and white lanterns. I went back about thirty feet from the rear of the observation platform of the train. That is the reason I got [146] off.

Cross-examination.

(By Mr. COTHRAN.)

I couldn't say how many sleepers were on that train that night; I don't know. I was rear brakeman. I do pass through the cars as brakeman; couldn't say how many sleepers there were. There was at least two standards and one tourist; that is all that I could say. There was that many, I know. Some of the people were asleep, I suppose. I didn't look in to see. The sleepers are always lit up and the berths were made down and the curtains were drawn. It appears to shut the light out from the outside in a measure in that part of the car. I did not go down after I got off of this train into the crowd; did not hear or know anything about this accident.

Testimony of Chester Smith, for the Defendant.

Direct Examination.

(By Mr. GORTNER.)

My name is Chester Smith. I am employed as brakeman by the Southern Pacific Company, and was working for the company for the last couple

(Testimony of Chester Smith.)

of years. I was brakeman on this train that we have been talking about, train number ten, that run south to Paso Robles on the night of October 8, 1910.

I was head brakeman; was riding on the front end of the first chair-car, on the steps, coming down into the depot. I do not know, particularly, how fast [147] this train was running as we passed the water-tank; probably fifteen or twenty miles an hour. From there on until it stopped it slowed down. I saw people as we went past the station grounds. I was standing on the steps, that is, as I was coming into the depot, right down on the bottom step. I was going to let the passengers off that were to get off, and to keep the others off that wanted to get on. When my car got along there, probably going—well, the first one was probably going seven or eight or ten miles an hour, and the last ones, why, we stopped between the cars, stopped opposite the people. Between the smoker and the chair-cars stopped opposite the north end of the depot, so when we got opposite the big crowd, why we were practically stopped. The rear-end of the smoker and the front end of this car I was on were right about opposite the end of the depot when we stopped. It was a regular stop, gradual slow-down. Fifteen feet back of that stop, the train was moving about three or four miles an hour—just a rough guess.

As the train was moving, the rush come up, you see. As we got up to where the main body was, we were practically pretty near stopped, and they crowded right in to get on, and I kept them off of

(Testimony of Chester Smith.)

the steps until I could get what few passengers we had to get off, and then I let them get on. I kept them from getting on to the steps that we were on. There was nobody there to keep people off the smoker steps. Just as we pulled up there the soldiers piled in on the smoker steps as fast as they [148] could. I did not see anything that happened back at the rear-end of the car I was on.

I did not see Captain Ward get hurt. I first learned that there had been an accident after most of the people were on. Somebody said a man got hurt back there. I went back; someone was bringing a stretcher, and they put him on the stretcher when I got there. If I remember right, he was back just off the second chair-car, probably—oh, maybe a quarter of the way, or an eighth of the way of the second chair-car. That is a quarter or an eighth of the distance of the front of the second chair-car back. I didn't notice he was holding his leg. They were bringing a stretcher there. It was before he had been lifted on to the stretcher.

Cross-examination.

(By Mr. COTHRAN.)

I saw them try to get on the car while it was in motion, but where I was, it had stopped practically, the main part of it. They did try to get on the car, on the rear-end of the smoker. I kept the people off where I was. I was down on the lower step so they couldn't get up. Nobody tried to force themselves against me, or anything. I think, if I remember

(Testimony of Chester Smith.)

right, there were about eleven cars on the train that night; there was one smoker and two day coaches; after the two day coaches come the tourists, the dining-car, and three Pullmans, and then the observation. The smoker stopped opposite the waiting-room at this station. The smoker was next to the [149] baggage-car. The baggage-car was first ahead of the smoker, and then the smoker. I am sure that they simply stopped opposite the waiting-room. [150]

Testimony of B. F. Dickerson, for Defendant.

B. F. DICKERSON, a witness produced on behalf of the defendant, having been first duly sworn, testified as follows:

Direct Examination.

(By Mr. GORTNER.)

At present I am employed by the State Highway Commission; we are stationed now at Gaviota for the postoffice. I used to live at Paso Robles; was there on the night of October eighth, 1910, when there were a great many soldiers up there, and Captain Ward was hurt. I was down at the depot station before No. 10 came in. I worked for the Southern Pacific Railroad about a couple of months. I think it was in 1909, and have had nothing to do with the company since that time.

When No. 10 came in, in my judgment, it wouldn't be over three hundred people who were gathered along the station grounds and in the adjoining ground. It seemed to be split into groups; they all

(Testimony of B. F. Dickerson.)

seemed to be kind of grouped off into bunches talking to each other. The train, it seemed like, came in very slow—in fact, it seemed like as though it came in at a little lower rate of speed than usual, seeing that there were such unusually large crowds than what there is usually standing there, and I should judge that the train came in slower than usual. I shouldn't judge the train to be going over four or five miles an hour past the main crowd.

I went to Paso Robles in '92; had been down at the depot ever since I was a kid, you might say. I know [151] where the southbound passenger trains stop generally; but I couldn't designate the exact spot, but on an average it stopped some ways near the—opposite the baggage-room, as near as I could judge, somewhere along in there. It would be the baggage-car would stop opposite the baggage-room. To the best of my knowledge it seems as though this No. 10 that night stopped along about the regular stopping place; that is my best observation of it.

I can't say that I seen anybody board the train as it was coming alongside the crowd, because the soldiers when the train came in would, I should judge, be about six hundred feet from the depot; that would be north. It seemed as though the soldiers made a run on to the train and after that I couldn't say whether—how many tried to board or anything in that respect at all. They ran toward the way the train was coming; that would be north of the depot;

(Testimony of B. F. Dickerson.)

to catch the train and get seats before the train would stop.

I was standing about, when I heard the whistle, right along about twenty feet, north of the depot, it would be (indicating on map).

I think I recognized Captain Ward standing down north of the depot before the train came in. Afterward I knew that the man that got hurt was the same man I had seen standing down there alone. The first time I noticed Captain Ward was standing right along here beside these iron posts (indicating a row of posts marked on the map near the northern end), somewhere [152] in that vicinity. I saw Captain Ward standing here for a while and then he walked up toward the main line, between the house track and the main line. I couldn't say how many minutes before the train came in I last saw Captain Ward, but it seemed to me, although it was about the time the train whistled, it would be up, I suppose within a mile of the station—and walked over between the house track and the main line.

These soldiers that I say I saw when the train got down within about six hundred feet, some of them tried to catch the train, I should judge, on this side. As the train got alongside the crowd I couldn't see any of them attempting to get on the steps, because it was too big a crowd moving around.

I did not see Captain Ward fall. I first saw him on the ground after the crowd had quieted down and most of the soldiers had boarded the train. Somebody made a cry, "There is a man hurt!" and I

(Testimony of B. F. Dickerson.)

walked over and I looked down and saw Captain Ward lying by the car. I should judge it would be about forty or fifty feet north of the depot; he was lying right beside the car. His body was lying out by the trucks, as I seen it. I think it was the front trucks of the second chair-car, that is, between the first and second trucks of the chair-car, where Mr. Ward was lying. He seemed to be between a pair of wheels of a set of trucks, about opposite that, from the view I got. I should not judge that the train as it passed where I was there was going at the rate of [153] eighteen or twenty miles an hour. If it was, they would be away down toward Pasadena before they could stop, at that rate. It seemed a very mild stop. It didn't seem to jar the train, or anything like that.

Cross-examination.

(By Mr. COTHRAN.)

I was brakeman when employed by the Southern Pacific Company for about two months. On October 8th, 1910, I was working for the S. P. Milling Company. That is not connected with the Southern Pacific in any way that I know of; never had much experience as a brakeman; worked as a brakeman, all told, close on to two months. Don't know how many cars there were on that train that night; didn't count them. When the train was stopped the baggage-car was about opposite the baggage-room, just about as near as my judgment tells. It seems to me as though there was one freight-car along on the house track there that night. The best of my recol-

(Testimony of B. F. Dickerson.)

lection is that the baggage-car stopped as near the baggage-room as they could. Where they could get almost a clear shot from the baggage-car to the baggage-room without going around the box-car. I am familiar with the water-tank about six hundred feet north of the station; had no special occasion to notice the speed of the train at that point; do not think it was going as much as twenty-two or twenty-three miles an hour past the water-tank. I don't think it was going at that high rate of speed. [154]

Testimony of Herbert Simonds, for Defendant.

HERBERT SIMONDS, a witness produced on behalf of the defendant, having been first duly sworn, testified as follows:

(By Mr. GORTNER.)

I am an estimator in connection with interior finish, marble and tile work; reside in Los Angeles; and was a member of the National Guard in October, 1910; not an officer.

I was at Atascadero and Paso Robles during the encampment in September and October, 1910. Was at Paso Robles on the night of October eighth, 1910, when Lieutenant, then, now Captain Ward, met with an injury. I know G. L. Hammond, who was called as a witness to the accident; knew him at that time; was just casually in his company that evening. He was with a crowd. Before the train arrived, I might have seen Captain Ward there, but didn't recognize him. I was pretty near at hand when he got hurt.

The first recollection I know of him was when I fell over him in the crowd, and going toward the

(Testimony of Herbert Simonds.)

train, it seemed to be shoving. I was pretty well up against the cars, protecting myself. It seemed to me as if I put my hand out to stop myself from falling when I stumbled over something on the ground. When I picked myself up I saw there was a man lying there, and I had an electric flashlight in my hand—it was quite dark—one of these long electric flashlights, and I lit it. I [155] saw the man was lying there. He was laying away from the rail, and seemed all doubled up. And I saw leather legging and leg laying over the rail, and I dropped my flashlight on the ground, and someone else made a pass as if to pick up his leg, and I sort of grabbed him by the shoulders. About that time a gentleman, a civilian physician—I don't know what his name is now—at the present time he is the physician in the National Guard—I noticed what he was doing, and just about that time another gentleman came up, I recognize now as a Captain of the regular army in civilian clothes, Captain Thomason. And I was taking off my belt to put on a tourniquet, and several others offered—threw things down for tourniquets, and we were working one on, and Captain Thomason regulated this tourniquet and gave instructions as to what to do with the man. Pretty soon they came with the stretcher and several helped to put him on the stretcher, and I was on the right-hand side of the stretcher at his head, and carried the stretcher to the baggage-car, up into the baggage-car, and stayed with the stretcher until it was delivered to the ambulance at Atascadero.

(Testimony of Herbert Simonds.)

When I saw him on the ground and his leg there to my recollection it was in the middle of a car. The car was very dark and I didn't notice what kind of a car it was, although I believe it was a closed vestibuled car. We didn't take him out between the rails. He was out when we stumbled on him. His foot was still under there. I didn't move from that spot. It was just a matter [156] of lifting his limb over, and I don't believe he was moved a fraction of a foot from that spot. We just pulled his leg along out, just about as quick as I could straighten out, could act.

My judgment is that when the party went down to pick up the leg, that the train had stopped. I didn't pick the leg up, but when I saw the man move the leg over I believe the train was stopped. I should say that this took place fifty or sixty feet north of the station. I saw a group of officers at the station, at the depot; a great many officers were there; a good many were standing over by a row of low posts. I remember two or three of them that I knew. I should imagine that there was three or four hundred men there when the train came in. Well, I should say that as the train was approaching the depot that the inclination of anybody and myself, was to get on, ready to board the train. There was a movement of the crowd, but there was no surging. I don't see what caused Captain Ward to fall or how he fell unless it was the rush of the crowd. Nobody was attempting to board the train in this crowd that I saw. I couldn't say how they got; from where I

(Testimony of Herbert Simonds.)

stood the vestibules were closed. I had not seen the other part of the train forward of that; did not see any soldiers running northward toward the approach of the train.

Cross-examination.

(By Mr. COTHRAN.)

It must have been about ten or ten-fifteen I [157] got down to the station; came there with Mr. Hammond. I couldn't say as to whether I remained with him during the whole time until the train come in, because I talked to several people, and he was in the crowd. I don't recollect Captain Ward talking to a lady and a little girl. I did not see a man swing himself up on the steps of the car as that train came in. As the train was approaching Mr. Hammond and I were standing right alongside each other, looking in the direction of the train as it approached.

I didn't see anybody trying to swing on the train as the train came in before it stopped, no soldiers nor any person whatever, not a bit of disorder in that crowd at all—just like any ordinary crowd, waiting to take the train; the congestion that followed there at the time that that train arrived was like you would get on the train at the Pacific Electric to-day; it would be the same way; there would be a crowd trying to get on.

I had occasion to note the speed with which that engine went by. I couldn't estimate the speed in miles at the rate it was going, because I couldn't tell whether it was going five miles or twenty-five miles; I couldn't compare it with anything. My impression

(Testimony of Herbert Simonds.)

was that it seemed to be the impression of everyone in my section of the crowd that it was not going to stop; and when it finally did stop, why the only cars that had any light on them, that is, the cars that seemed light, some of the passenger cars were the cars in front of the train, and we all were going in that direction to get on. I know the particular [158] car that was in front—that Captain Ward was in front of was dark, and my flashlight gave the light around there. I believe several other men had flashlights.

The first that brought it to my mind that Captain Ward was down was when I fell over him; he was already down. I don't know where Captain Ward was standing before the train came in. I should say I was about midway between the two tracks. A little over thirteen and one-half feet away; there were men standing all around.

I know we had to go past the freight-car to get the stretcher to the baggage-car; we had a little time turning it around. There were a good many people congested back in there following the stretcher. When the train came in the Pullmans were backed up in this, towards the north, and the chair-cars were up this way and the coaches were down that way. (Indicating.) I don't know whether I went past that freight-car or not, but we were between them anyway; something called my attention to the fact, the cars, we were between them. There was a freight-car next to us, because it hindered us from getting our stretcher through. When the train came

(Testimony of Herbert Simonds.)

in I was not down that far, down this narrow space, in that direction to the south there toward that car. I know I went on that track; the general crowd pushed me in that direction; it seemed to me the only cars to get on, to board the train, was down that way. [159]

Testimony of R. L. Ross, for Defendant.

R. L. ROSS, a witness produced on behalf of the defendant, having been first duly sworn, testified as follows:

Direct Examination.

(By Mr. COTHRAN.)

I live in Barton, Oregon; lived in Paso Robles about two years ago; was night clerk of the Alexandria Hotel. There was an Alexandria Hotel there at that time; had been night clerk a little over two years then. We made the trains for the hotel, that is, the night trains. In October, 1910, we had an auto bus for the hotel, which I drove.

I went down to the station to meet No. 10 along about after ten o'clock on the night of October 8, 1910. I had a load of about twelve soldiers in my auto bus, which I took on to the hotel, in front of the bar-room. They wanted to wait as long as they could, so I could make the train for them. They had been drinking. When we got down to the depot I stopped my auto bus very near to the end of those little iron posts north of the depot. I referred to this row of posts along there on the exhibit, marked Defendant's Exhibit view number four. About in here is where I stopped (indicating). When the

(Testimony of R. L. Ross.)

train came in sight there must have been three or four hundred on the platform in groups standing around.

I saw Captain Ward before the train came in. First I seen him walking on past down alongside the bus, [160] right in above here. I think there was another man with him. I don't recall who he was. I saw Captain Ward about the time the train approached the station; he had got back up this way; he was walking toward the main track. There was not such a jam right in there; the jam was more up above there, toward the depot.

I had been making that train right along for a period of years. It didn't pull in any faster than usually. It stopped about the usual stopping-place. My crowd of passengers stayed in the auto bus, and the train got alongside, and they drank some liquor in the bus. When the train got alongside they got out and ran across to the train, all but one. They made this rush more up the track, north of where I had just seen Captain Ward. They run for the train, when it was just about alongside; the engine just passed, and they unloaded from my bus and started across.

I did not see Captain Ward go down. I saw some of those men try to get on the steps of the train. There was one or two succeeded in boarding it. I was over here, and this soldier that was on the car wanted to get out, and he was standing on the fender of the car, and I came back up here and they were all going right in here where Mr. Ward was under the car. They hollered and I wanted to see him, and

(Testimony of R. L. Ross.)

a soldier pushed me on back and told me they would tend to him and didn't need any help. When I saw him on the ground after the accident was over he must have been above fifty feet north of the [161] station. That train must have been going about five miles an hour when it passed me—about as fast as I could walk, real fast. Some of the soldiers that had got out of my auto bus were able to get on the steps.

Cross-examination.

(By Mr. COTHRAN.)

C. S. Iverson owned that hotel where I was working at that time. The liquor was sold to these soldiers in the bar-room, not by myself. Some of them was very drunk, and some of them was not. There were twelve of them in the bus and eleven of them got out. That one man was drunker than any of the others was. The other eleven could run pretty good; they were not so drunk but what they had their legs; some of them run faster than the others did. Some of them went pretty fast toward the train and some of them not so fast. I don't think I saw them put hands on anybody.

I had seen Captain Ward before the train came in. I didn't see any of these soldiers push against Captain Ward or touch him.

When these soldiers succeeded in boarding the train they were at the row of posts north of the depot. The bus stopped just alongside of the lamp post, the arc-lights there. I would not call it hardly fifty feet, where the bus stopped; about thirty-five or thirty feet. I did not stop my bus there; that was

(Testimony of R. L. Ross.)

the Paso Robles bus; my bus was about fifty feet north of the waiting-room. The soldiers succeeded in boarding the train very near [162] opposite the Alexandria bus that I was driving, that would be about fifty feet from the north of the waiting-room, probably.

My observation of the matter was not so close that I saw Captain Ward go down at all; but I did see some soldiers board the train at some point. Some of them run faster than others. They did not move in a compact body but was scattered.

Redirect Examination.

(By Mr. GORTNER.)

The place where I saw the soldiers run and some of them board the train was north of where I had seen Captain Ward—I don't know just how far. It was up to where I had the bus at the end of those posts, and Captain Ward was south of where the bus was—went over near the track. I don't know how far south of where the bus was when I last seen him; it must have been about fifteen feet.

I couldn't say whether Captain Ward moved further to the north after I saw him before the train came in.

Testimony of Ben Pierce, for Defendant.

BEN PIERCE, a witness produced on behalf of defendant, having been first duly sworn, testified as follows:

Direct Examination.

(By Mr. GORTNER.)

I live now at Point Richmond, Contra Costa

(Testimony of Ben Pierce.)

County; [163] I formerly lived in Paso Robles; was living there two years ago and was City Marshal; had lived in Paso Robles about twenty-five years. During the last few years of my residence there and prior to October, two years ago, I got down to the depot, saw the south-bound train stop very often; would be at the depot in the line of my official duty as City Marshal; there was always something to look out for for an officer. I knew the usual stopping place of the passenger trains southbound.

On the night of October eighth, 1910, the night that Captain Ward was hurt, I was down at the depot there perhaps a half an hour before train time, and saw the train come in. The engine stopped within a very short distance from where it usually stops. I was looking out for some parties to get on there and they didn't, and I stopped about where I thought it generally stopped. When the train came in I was south of the track and came up toward it, meeting it, and it stopped where they usually do, which would be just a little south of the south end of the depot structure. I do not mean that the whole engine would be south of that. Part of it, perhaps one-half of it, would stick out maybe a little more or less from the far end of the depot. The engine would be along about amidships of that end of the platform; there is where it stopped that night. When the train came in around the corner there, where we could first see the light, I was down along here somewhere,—I [164] guess there is a cattle corral in here somewhere. I was walking up in front right

(Testimony of Ben Pierce.)

along the track, on the main line, I was coming right up here—this is the house track here—when the train came around the point here at Thirteenth street, where it whistles, where you could first see the light and I walked up right along here, and was here when the train came in. I was not right on the track, but I was just, you might say, in front of the engine when it just about stopped. It just come down gradually, like a great many other times. I've been along there perhaps a hundred times and seen them coming. There was some blankets stolen from a lodging-house up there and I was trying to find the party that got the blankets, and I was down there searching around and looking around, and then I seen the light of the train and then I walked up where the train was so I could be alongside the engine to see if they got in, and if they weren't there I was going up to see if anyone had got on the train with them.

I had been through a part of the crowd in that one-half hour while I was down to the depot; perhaps ten or fifteen minutes before the train came in I came down along the track, out for those parties. I had no occasion to say anything to the crowd; didn't see anything in the world that indicated any necessity for policing or controlling that crowd. About fifteen minutes before the train came in I should think there was over seventy-five or one hundred there. They were [165] scattered along, and they were coming in gradually all the time, coming from the town.

(Testimony of Ben Pierce.)

When the train came in I was out there in front of the engine. I didn't see anything that the crowd did or see how Captain Ward got hurt, or anything of that kind; only I seen them rush up and they said someone was hurt, and I walked up that way. I seen them as they were putting him on the stretcher; that was about, I think, sixty or seventy feet north of the station. I saw the Hotel Alexandria bus there. I had known Bob Ross for several years; he was there driving the Hotel Alexandria bus. I knew Dad Pollock at that time; he drove the Paso Robles Springs bus, and was there that night.

Cross-examination.

(By Mr. COTHRAN.)

I couldn't say—I don't remember whether the train was on time that night. I knew it come in just about a certain time and I was out there to look around. I was not thinking whether it was on time or not, and I never asked. I never heard anybody say; didn't think anything about it being late. I am not a railroad man. I was standing practically in front of the train as it approached; I kind of walked up and met it, like. I was not walking alongside of it. I was going to meet it. It was surely going faster at the time I first seen it up about 13th street, because I don't think I could have walked that far in that time. I was not looking into the electric light or the locomotive focused down the track there. I [167] never look right straight in an electric light when they are coming. When the train came in I was walking right up the track between the main

(Testimony of Ben Pierce.)

track and the house-track; the distance between the house-track and the passenger-track, I guess, is about twelve or fifteen feet.

I would not say whether the head of the engine or the nose of the engine stopped opposite me or went by me for I was walking up and I never paid any attention to just whether the engine stopped before I stopped or whether I stopped before the engine did. I would not say, and I don't remember now whether I stopped when I met the engine or not. I was not thinking about the engine stopping or whereabouts it would stop or anything about it. I knew about where it always stopped before, and I wanted to see whether the parties would go on the engine or around the depot there. I was not thinking about whether it was coming in—if it had been coming in fast I surely would not walk alongside of the train, I don't think. I don't know. For I was satisfied the way the engine was coming, in my mind, that the train was coming and was going to stop there. If there had been an engine or train going through, I surely would not have stood in front of it. I don't walk very near a train or engine at all.

Charles Rude, a Witness for Defendant.

CHARLES RUDE, a witness produced on behalf of the defendant, having been first duly sworn, testified as [168] follows:

Direct Examination.

(By Mr. GORTNER.)

I am working for the S. P. Milling Company at present. I don't believe that has anything to do

(Testimony of Charles Rude.)

with the Southern Pacific Railroad Company. My home has been in Paso Robles for nearly twenty-one years. I was in Paso Robles on October eighth, 1910, the night that Captain Ward was hurt, down at the depot. I probably was there fifteen minutes before the train arrived; saw Captain Ward before he was hurt. As near as I can remember, he was standing probably twenty feet from a corner light-post north of the depot, from where that arc-light was. I don't think he was as far away from the track at that time as the light-post. There is a side-track, the house-track there. At the time I first saw him standing there I should judge I was about fifteen feet from the main-track. At that time I should judge there were two hundred people there, in bunches probably thirty-five or forty or something in that neighborhood, in a bunch. I believe, to the best of my knowledge, Captain Ward was alone when I first saw him, passed him; I never noticed him again between that time and the time he was hurt.

The next time I saw him he was laying by the front truck of a chair-car. I saw that train come in; know where the regular stopping place of the southbound passenger trains was. I saw where this train stopped that night; it was about the same place they always stop. [169] When it was at the tank down there it whistled four or five times from the tank on up; that is, the water-tank that's north of the station. I was about from this post, this light-post. I was standing just off toward the track a little ways from it (indicating). It seems to me that post has been

(Testimony of Charles Rude.)

moved; it had an arc-light on it and I was standing between that post and the house track and saw the train coming down there. When it got within one hundred feet of the station I should judge it was going four or five miles an hour. It stopped as it usually does. It did not come up at eighteen or twenty miles an hour and then make an abrupt, quick stop.

The crowd was pretty thick crowd there, and it seemed to me, if I remember right, they crowded in toward the train. I did not see anybody trying to get on the steps; did not see Captain Ward fall. After he was run over I heard some of the soldiers say a man was under the train, and I walked up, and it was some little time before we could see. Then I saw him on the stretcher. I should judge he was about thirty-five feet north of the station, something like that; I didn't measure it.

I knew Bob Ross, the driver of the Hotel Alexandria bus at that time. I would not swear that I saw him there that night. He was always there. He was there; that is his bus.

Cross-examination.

(By Mr. COTHRAN.)

When the train was coming from the direction [170] of the water-tank, it whistled,—I suppose four or five times. I do not think that the train was running as much as twenty-two or twenty-three miles an hour at that point. I think it was running at considerably less speed at that point. I don't think it could have been over seven or eight miles an hour.

Testimony of R. P. Pollock for the Defendant.

R. P. POLLOCK, a witness produced on the behalf of the defendant, having been first duly sworn, testified as follows:

Direct Examination.

(By Mr. GORTNER.)

I live in Paso Robles and drive the bus for the Paso Robles Hot Springs Hotel. Have done so along year; make all the trains; was working there along two years ago in October, when the soldiers were there. I was at the depot when Captain Ward was hurt; had it stationed right where that post is, where that arc-light was. I did not see Captain Ward before he was hurt. There were so many there that night I didn't know him from any of the rest of the officers.

I saw the train come in; had seen the south-bound passenger train come in before that, for all the time I had been working there. It was not coming in so very fast. It was just kind of past the water-tank there and it began to slow down, but when it got into the depot, you know, this crowd of boys made a break for the train before [171] the train stopped. When the train was going past the crowd it looked to be going about the usual speed.

There was such a bunch of the soldiers there that I couldn't see whether there was any of the boys had got on the steps or not. You know I was on the ground at the time you know, and I couldn't see. There was such a bunch I couldn't tell exactly how many there.

(Testimony of R. P. Pollock.)

Before the train came alongside the crowd was quiet and orderly; they were talking, of course. There was not any noise. And then just as it was coming on the crowd made a break for the train. When the train stopped, the smoker and the chair-car was put about opposite to where my bus stood; that was about the way they would usually stop. I didn't see Captain Ward afterwards where he lay on the ground.

Cross-examination.

(By Mr. COTHRAN.)

I was with the Paso Robles Hot Springs Hotel there; some of the Southern Pacific Company own it. I would say the train was running about thirty or forty miles an hour at the water-tank, somewhere along there. Just as it was coming into the depot it was just fairly slowed down, you know.

[Testimony of E. M. Reynolds, for the Defendant.]

E. M. REYNOLDS, a witness produced on behalf of the defendant, having been first duly sworn, testified as follows: [172]

Direct Examination.

(By Mr. GORTNER.)

I am a Southern Pacific employee; clerk in telegraphy at Guadalupe. Have lived at Paso Robles. Was at Paso Robles on the night of October eighth, 1910. In the daytime I was warehouseman and baggage-master for the Southern Pacific Company; had been located at Paso Robles working for the company there for a year. I know where the pas-

(Testimony of E. M. Reynolds.)

senger trains southbound usually stop. I set my baggage truck for the purpose of meeting southbound trains every time in the daytime, opposite the first warehouse door nearest to the office. That is the warehouse that is in this Paso Robles depot; the warehouse and the station is one building. I was at the depot the night this accident happened. The train stopped that night right in the same place, just the same as always. There was a box-car there at the platform. I did not use those box-cars for passenger baggage. I got the passenger baggage from the baggage trains on a four-wheel truck. You can pass two trucks very easily between the house track and the main track.

I saw the train pull into the Paso Robles station that night. I was in the office most of the time until I heard the train whistle, and I came outside and stood in front of the office door. When the train got about to the water-tank, I crossed the house track and stood between the house track and the main line, and then walked on down towards the end of the waiting-room. [173]

Right in there is the door I came out (witness indicates point in diagram marked "D"). I walked out and stood at the point marked "Dot" opposite the "D," and went up and crossed over and walked on until I was about at the point marked "C." I stood there until the train went by. The engine passed it about four miles an hour; didn't go eighteen or twenty miles an hour when it went past there. It was the usual stop they always made.

(Testimony of E. M. Reynolds.)

When the engine went past me at that point, my judgment is it was going four or five miles an hour.

As the first coaches got at that point, the smoker and the day coach, the soldiers started to move. There was a few of them ahead of me, that is, south of me and they all started to move towards the train. I believe I did see some of them succeed in getting on the steps. I believe I saw two get on; several reached to get hold of the hand-rail. I didn't pay any particular attention, but I think I saw two get on the steps. Then the train kept on and came to a regular stop at the usual place.

I did not see Captain Ward get hurt. I looked to see *how* the train baggageman, was at the time, and then I heard somebody holler, "A man under the train!" so I walked down there and the crowd was gathered around, and I couldn't get in, and I walked back to the baggage-room to get a stretcher, and while I was getting my keys out somebody opened the baggage-room from the inside and brought the stretcher out. I went down and I stood as [174] near as I could, and then they took him into the baggage-room. He stayed in there probably five or six minutes, and the conductor said to put him in the baggage-car, and some officer there told some of the soldiers to pick up the stretcher, and they wouldn't do it, they just stood there, and I took the left-hand side of the stretcher and some other citizen there, I don't know who it was now, took the other end, and two officers had the other two corners, and took him

(Testimony of E. M. Reynolds.)

out and put him into the baggage-car.

As soon as I let go of the stretcher I leaned against the door of the box-car there for a few seconds, and then I walked back into the office, and I believe it was this gentleman here (indicating) came in to send a telegram, Captain Thomason. I recognized him here as quick as I saw him here as the one that went and wanted to send the telegram.

Cross-examination.

(By Mr. COTHRAN.)

I believe I saw two persons get on to the steps of that car, while it was in motion, just about directly opposite the waiting-room. During the day I was baggage-man there; at night I had no duty at the depot. I was off at six o'clock; was off duty that night. I don't remember that that Sunset Express that night carried no mail-car; the day train carried a mail-car. [175]

[Testimony of Charles N. Wheeler, for the Defendant.]

CHARLES N. WHEELER, a witness produced on behalf of the defendant, having been first duly sworn, testified as follows:

Direct Examination.

(By Mr. GORTNER.)

I am connected with the Southern Pacific Company in the capacity of switchman, depot engine at San Jose. I never worked for the company at Paso Robles; had been visiting there for a year for my health; was there on October eighth, 1910, the night

(Testimony of Charles N. Wheeler.)

that Captain Ward was hurt. I was off on a year's leave of absence then on account of my health.

I got down at the depot that night about ten-thirty, and saw Captain Ward before the train came around, on the platform. I saw him walking down along the row of posts and I saw him standing talking. I didn't recognize Captain Thomason. I recognized Captain Ward, but I didn't know his name. I recognized his face. I have seen him in San Jose lots of times taking the train there. I can't say that I located him again before he was hurt, because I had moved around in the crowd myself, up and down the platform.

I should say there were, perhaps, two hundred and fifty there when the train pulled in. I was not in the crowd. I was standing back of the crowd, north of the depot, about opposite that electric light that was on a pole there. I was standing on the house track about [176] opposite the electric light. When the engine passed me at that point it was making, perhaps, six miles an hour; not much more. I should say I was forty or sixty feet north of the depot.

I saw trains stop there quite often. I had been going in and out on trains to Paso Robles for several years. This train stopped just at its usual stopping point. The stop was just the ordinary service stop; just drifted in; just drifted down, nice and slow down to this platform.

As the train went by me, going only six miles an hour, I saw some of these soldiers around there try-

(Testimony of Charles N. Wheeler.)

ing to board the train. They had jammed in the entry of the two cars, in the space where the steps are. And there was one pair of arms tried to get in between the Pullmans; hands up on the rails. I could see that. One man had a hold of the hand-bars of the rear of one car and the front of another; tried to climb between them. The train was still moving at that time; it didn't make but one stop at that station. I saw the crush going for that train, and I knew the danger, and I saw a man bob a little bit in the crowd as they were going sideways, this way, to the train (indicating), and stumble like that (illustrating), and I immediately tried to get through the crowd, as I knew something had happened, and I got in alongside of the coach. There was two men with Captain Ward and there was—they pulled him out—he was on his stomach like this (illustrating); his head they pulled out, and I says to one man standing there, I [177] says, "What happened?" He says, "He is hurt." I don't remember the exact words. I says, "Did the wheel get over him?" He says, "Yes." I says, "What part of him?" He says, "Leg." I says, "Both of them?" He says, "No; one." I says, "You need a rope right quick," and at that some of the soldiers standing there in uniform produced a strap from somewhere, I don't know, and he reached down, took this leg right here (illustrating), and started to put a tourniquet on it above the leather pates that he had on. And I turned around and I says, "Get a stretcher out of the baggage-car. I will go and get it myself." I

(Testimony of Charles N. Wheeler.)

figured I could get it myself; of course I could perhaps get it quicker than one of the soldiers. I started after the stretcher. I got down there and somebody had gotten the stretcher before I got there.

The distance from the main line to the house track where I stood, I should say it is about twelve feet. I was, apparently, about twelve feet from where he fell. The position Captain Ward lay in from where they had moved him outward, he was, I should say he was about two feet back of the wheel of the front truck, of the second day coach. I use the same word for day coach and chair-car. When I saw this commotion and rushed in over there the train had stopped.

Cross-examination.

(By Mr. COTHRAN.)

I had been there at Paso Robles before that night of the eighth of October five or six months, resting [178] for my health; had occasion to observe passenger trains come in both day and evening; some of them carried mail and some of them didn't. The Sunset Express didn't have any mail-car at all that night. The day train did at that time. The trains made their baggage stop according to the spot of the trucks, baggage trucks. That is what I go by, that the passenger train makes the stop. There were two baggage-cars, smoker, two day coaches, tourist, diner, two standards, and the observation-car. The day coaches were all lighted. The others were lighted. It might have been the curtains were drawn, but the coaches were lighted; that is, the entrance to the

(Testimony of Charles N. Wheeler.)

vestibules was lighted.

I observed that train coming, when it whistled when it got near the water-tank. It was a hard thing to judge at what speed it was going at that point, from where I was. From the exhaust—I was just figuring on the exhaust from the engine—I should say when it came down there it was thirty miles an hour. That is before he shut off, coming up the grade.

Defendant rests.

**Testimony of John Wilbur Ward, on His Own Behalf
[Recalled—In Rebuttal].**

JOHN WILBUR WARD, recalled on his own behalf, testified as follows:

Direct Examination—In Rebuttal.

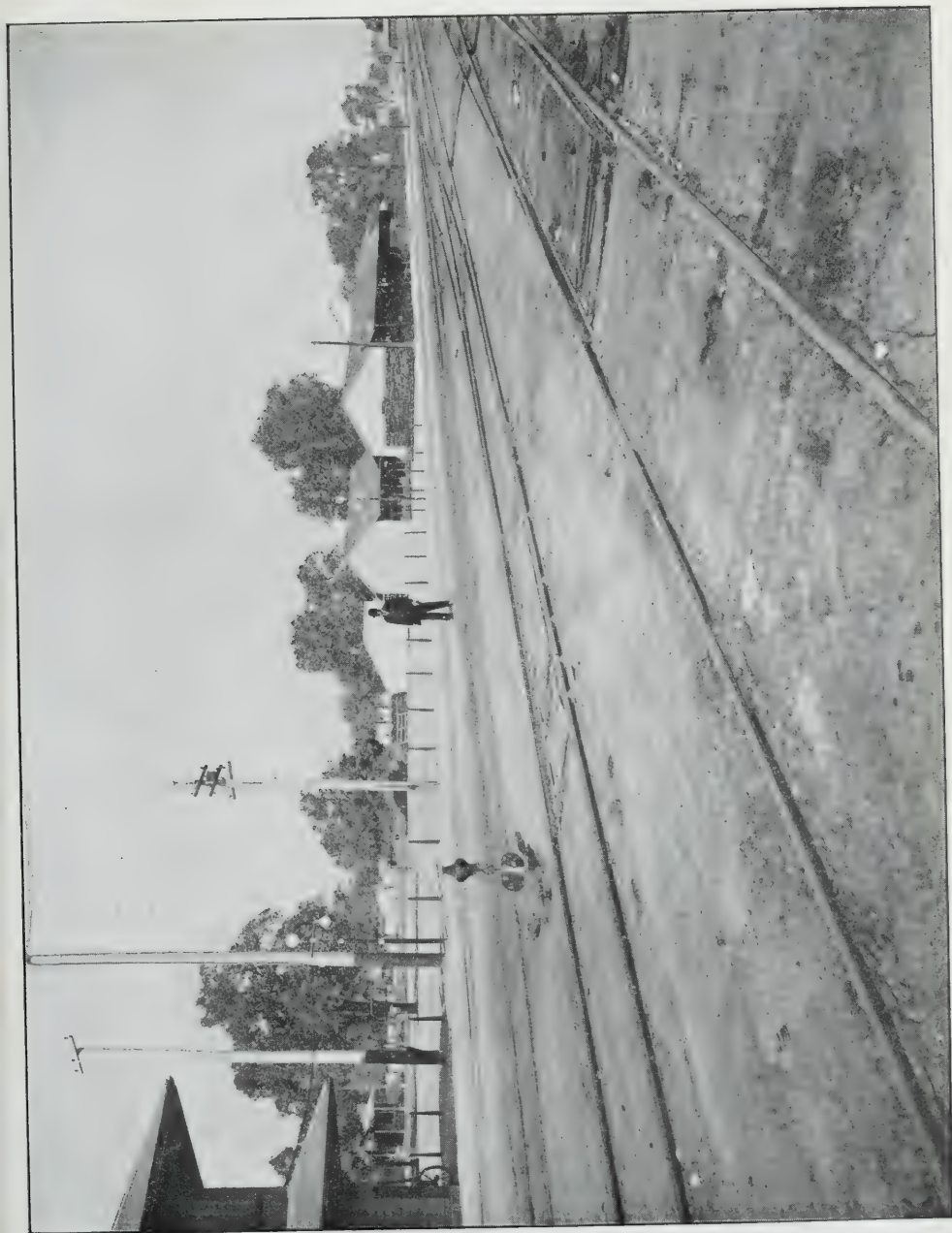
(By Mr. GORTNER.)

At no time when I was at the station at Paso [179] Robles on the eighth day of October, 1910, did I see or have any conversation with either a lady and a little girl, or a lady or a little girl.

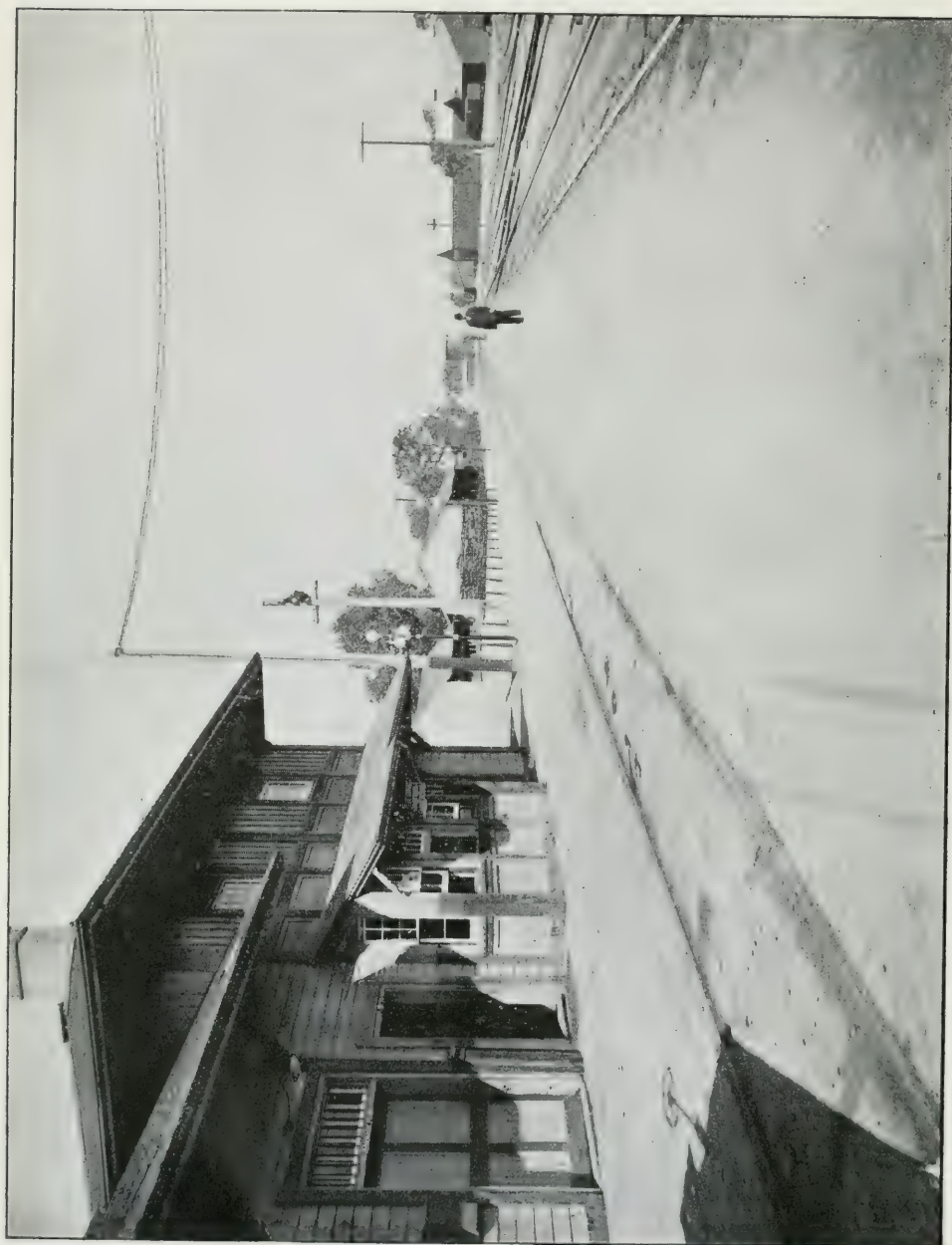
Whereupon both parties rested.

The photographic exhibits offered by defendant as “Defendant’s Exhibit Views 1, 2, 3, 4, 5 and 6,” are as follows, to wit: [180]

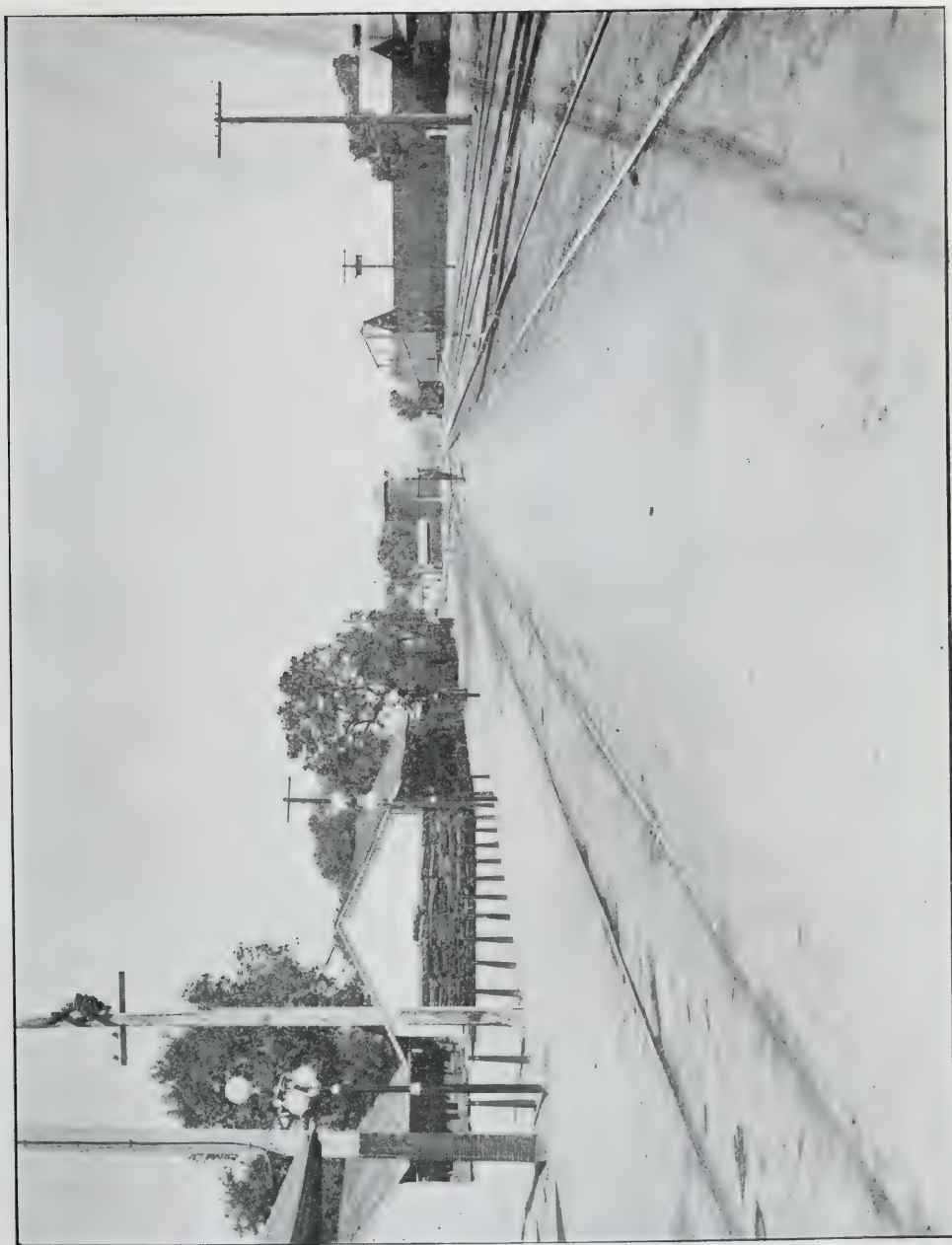
[Defendant's Exhibit View No. 1.]

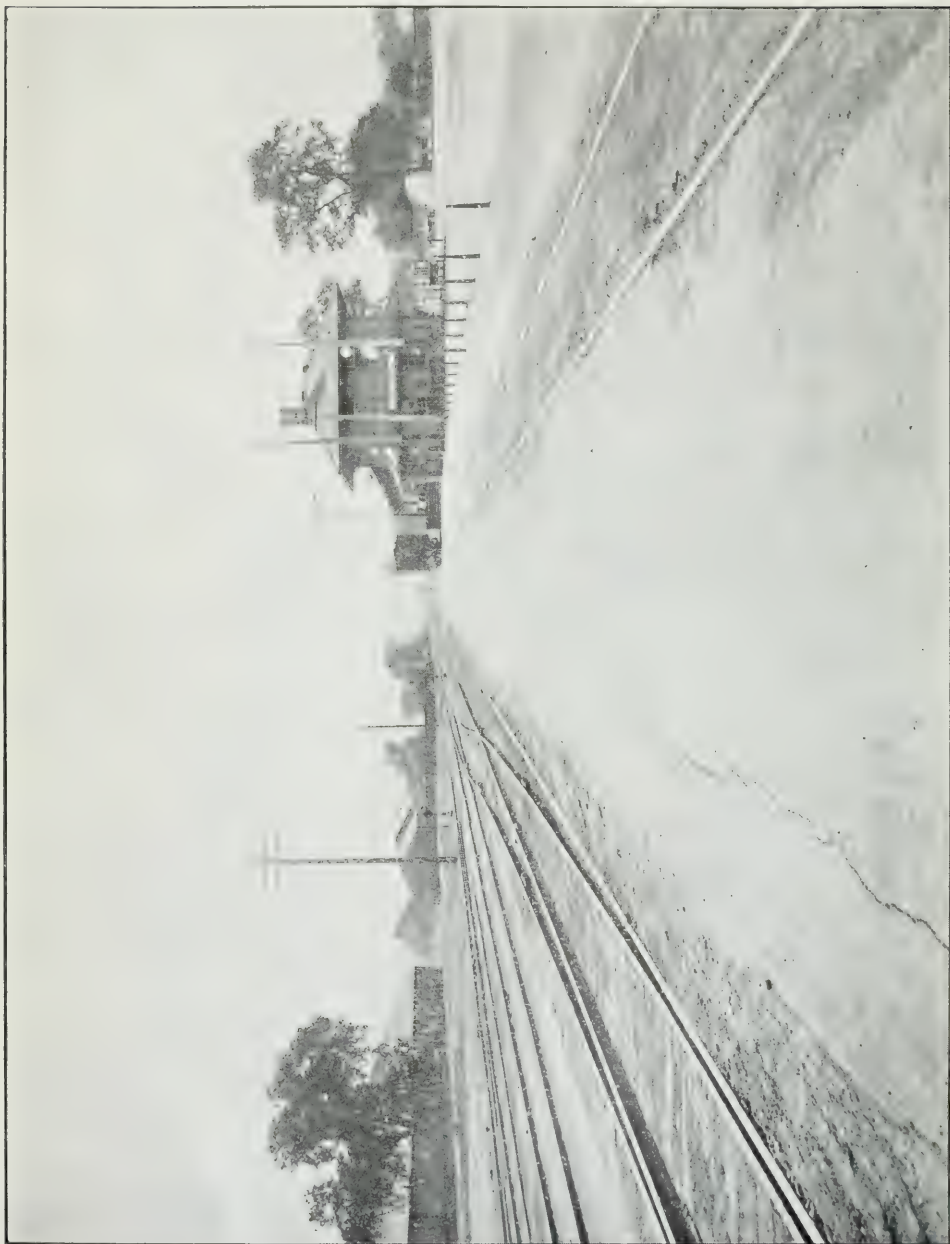


[Defendant's Exhibit View No. 2.]

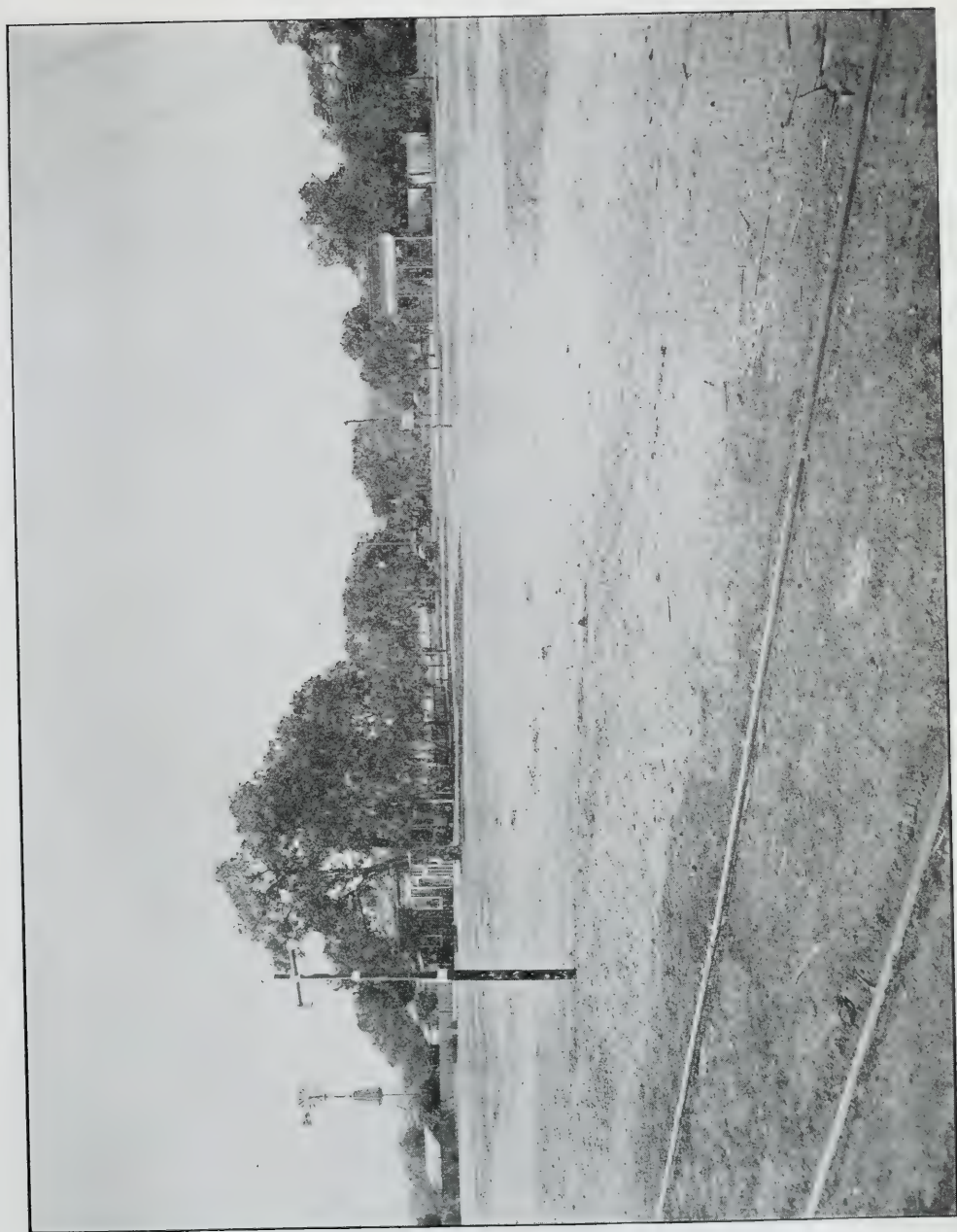


[Defendant's Exhibit View No. 3.]

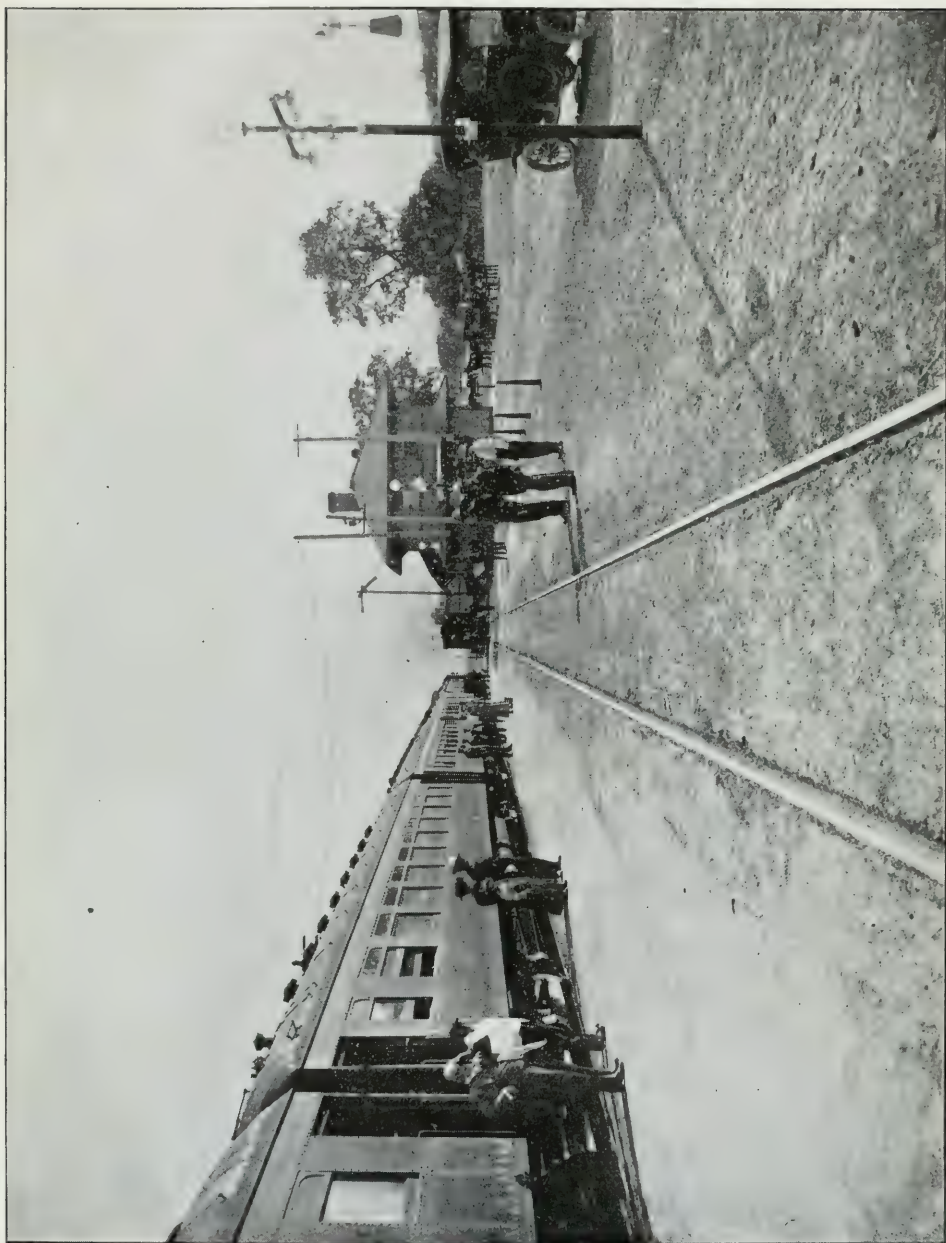


[Defendant's Exhibit View No. 4.]

[Defendant's Exhibit View No. 5.]



[Defendant's Exhibit View No. 6.]



The map hereinbefore referred to as used in evidence was as follows, to wit: [187]

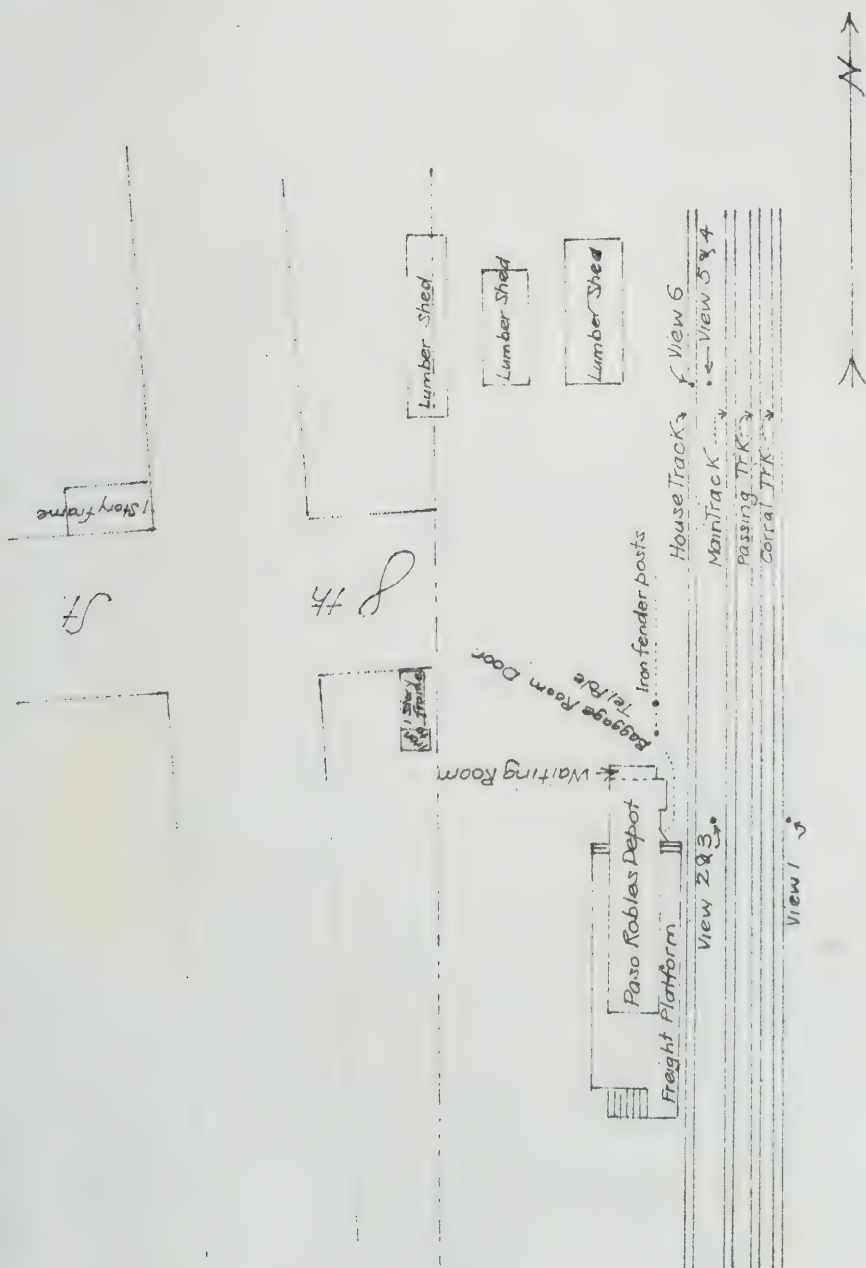


EXHIBIT 1.
Scale 1" = 100'.

**[Instructions Requested by Defendant, and
Refused.]**

Thereupon counsel for the defendant duly requested the Court, in writing, to give to the jury the following instructions:

I.

You are instructed in this action to return your verdict in favor of the defendant.

Which said instruction the Court refused to give; and to the refusal of the Court to give the same, defendant duly excepted.

Exception Number Thirty-nine.

Thereupon counsel for defendant duly requested the Court, in writing, to give to the jury the following instructions:

XX.

The degree of care owed by a railroad company to those upon a station platform who may intend to become passengers on a train is not the same degree of care which the railroad company owes to those who are upon the train or in transit. The degree of care owed to those upon a station platform is a reasonable degree of care, and not that which the law characterizes as the highest degree of care or foresight.

Which said instruction the Court refused to give; and to the refusal of the Court to give the same, defendant duly excepted. [189]

Exception Number Forty.

[Instructions.]

Whereupon the Court gave to the jury the following instructions at the request of plaintiff:

A.

Plaintiff alleges in his complaint, and defendant by its failure to deny in its answer admits, the following facts, to wit:

1st. That on and prior to the 8th day of October, 1910, plaintiff was First Lieutenant of the Thirtieth Infantry of the United States Army, commanding Company "M" of said Thirtieth Infantry, and also in charge of the Post Exchange of said Thirtieth Infantry at Atascadero, in the county of San Luis Obispo, State of California, and eligible to all the rights, salaries, emoluments and promotions in rank and honors appertaining to such army officer of First Lieutenant, and was of the age of thirty-five years.

2d. That at all times mentioned in the Complaint the defendant, Southern Pacific Company, was and is a railroad corporation, in the sole possession, management, maintenance and operation of a steam railroad in this State, known as the Southern Pacific railroad, together with the tracks, rolling stock, depot, stations, property and other appurtenances thereto belonging, and was and still is a common carrier of passengers and freight thereupon for hire, by means of cars and locomotives propelled by steam, between the cities of San Francisco and Los Angeles, in said State.

3d. That on said eighth day of October plaintiff paid defendant fifty cents for a ticket from said

Atascadero to said Paso Robles and return, and said ticket was then delivered by said [190] defendant to plaintiff, and defendant thereby undertook and agreed, on said day, as such common carrier, to transport and convey plaintiff as a passenger upon said railroad from said Atascadero to said Paso Robles.

4th. That defendant, on said day, did, in fact, transport and convey plaintiff as such passenger from said Atascadero to said Paso Robles.

5th. That during the evening of said day, at about forty minutes past ten o'clock, a passenger train of defendant, consisting of a number of cars and a steam locomotive, known as the Sunset Express, was due to arrive at said station of Paso Robles, southward bound for said station at Atascadero and other points upon defendant's railroad.

B.

Plaintiff also alleges in his complaint, and defendant by its failure to deny in its answer admits, that plaintiff sustained the injury at the time and place set forth in the complaint, that is to say, on the 8th day of October, 1910, at said Paso Robles, the wheels of defendant's said train of cars ran over and crushed the right leg of plaintiff; that said injury necessitated the surgical amputation of plaintiff's right leg at the knee, and that plaintiff's right leg was on said 8th day of October amputated at the knee by surgeons; that plaintiff has suffered and will continue for a long time to suffer great pain and mental anguish; that plaintiff, at the time his leg was run over and crushed by the wheels of defendant's said train of cars, was in perfect health, physically unimpaired,

possessed of a robust constitution, and was able to perform [191] and was in fact performing all his duties and labors as said army officer; that said injury is permanent in its character, and by reason thereof plaintiff will be unable, the rest of his life, to support or maintain himself in his said profession of arms or to earn or enjoy promotion in rank and honor, or receive any increase in salary in said profession; that by reason of said injury, plaintiff has been unable to perform any labor whatsoever, and will be incapacitated the remainder of his life from performing any labor in his said profession of arms; that by reason of said injury, plaintiff will be permanently retired from said army and will utterly lose the career which he has chosen in life, together with all the rights, salaries, emoluments and promotion in rank and honor to which plaintiff was eligible prior to said injury; that at the time of said injury of plaintiff plaintiff, for his services as said army officer of First Lieutenant, earned and received from the Government of the United States an annual salary of Two Thousand Four Hundred (\$2400.00) Dollars.

C.

You are hereby instructed that a corporation is an artificial person, a creature of the law. It must necessarily act through agents, servants and employees. The act of an agent, servant or employee of a corporation, acting within the scope of his authority as such agent, servant or employee, is the act of the corporation, and the negligence of the agent, servant or employee of a corporation in the performance of his duties and within the scope of his au-

thority, is the negligence of the corporation. [192]

D.

The defendant, Southern Pacific Company, is admittedly a railroad corporation, and, like all other corporations, must act through its agents, servants and employees.

E.

You are instructed that every railroad corporation must start and run its cars, for the transportation of persons at such regular times as it shall fix by public notice, and must furnish sufficient accommodation for the transportation of all such passengers, as within a reasonable time previous thereto, offer for transportation at stopping places established for receiving and discharging way passengers; and must transport such passengers at, from, and to such places on the due payment of fare therefor.

F.

You are also instructed that a carrier of persons for reward is bound to provide vehicles safe and fit for the purposes to which they are put; that such carrier of persons must not overcrowd or overload his vehicle; that such carrier of persons must provide everything necessary for their safe carriage, and must exercise to that end a reasonable degree of skill.

G.

You are further instructed that every railroad corporation must furnish, on the inside of its passenger cars, sufficient room and accommodation for all passengers to whom tickets [193] are sold for any one trip and for all persons presenting tickets entitling them to travel thereon.

H.

You are further instructed that a common carrier of persons for reward must provide a sufficient number of vehicles to accommodate all the passengers who can be reasonably expected to require carriage at any one time, and that such common carrier of persons must provide every passenger with a seat.

I.

You are hereby further instructed that, if you find that the plaintiff has been damaged by defendant, the measure of damages is the amount which will compensate plaintiff for all the detriment proximately caused by the accident, and if you find from the evidence that plaintiff sustained the injury complained of in his complaint, through the carelessness and negligence of the defendant, without negligence on his part, then you should find for the plaintiff, John Wilbur Ward, and assess the damages in such sum as you find, under all the circumstances of this case in evidence, the plaintiff ought to recover, not exceeding the amount claimed in the complaint.

J.

You are hereby instructed that “the duties rest upon a railroad company which has attracted an unusual number of people to a station by advertising an excursion to furnish greater facilities than usual to accommodate, care for, and protect those who avail themselves of this offer.” [194]

K.

“Where a railroad company, by reason of an advertisement of reduced rates, induces an unusual crowd to collect at its stations, it is bound to use such

means as are reasonably necessary to prevent injury to individuals from the conduct or pressure of the crowd in passing to and from its trains.”

L.

I further charge you that “passengers using the premises of a railroad station for the purpose of taking or leaving trains at such a station have a right to assume that the place is one of safety and to act upon that assumption.”

M.

I also instruct you that it is the duty of every public carrier of passengers to employ sufficient servants for the protection of such passengers, and it is under obligations to take due care to secure the safety of a passenger who is upon its premises peaceably for the purpose of boarding its trains.

N.

You are further instructed that if it is shown that two parties have contributed to the injury of a third person, then notwithstanding the act of one of such two parties may have been reckless and that of the other simply manifesting the want of ordinary care, neither of such parties is relieved of liability for an injury to such third person who was not himself guilty of contributory negligence. [195]

O.

I instruct you that, in determining whether or not the defendant was guilty of negligence in propelling its engine and cars into Paso Robles station on the 8th of October, 1910, is a matter for you to determine in connection with all the evidence introduced before you.

[Exceptions to Certain Instructions.]

And thereupon, before the jury had been directed to retire and consider their verdict, and while the jury were present in court, the defendant duly excepted to so much of said charge as is contained in the foregoing instructions E, F, G, H, M and N, for the reasons and on the grounds that the same were irrelevant and improper. [196]

[Instructions Given at Request of Defendant.]

And thereupon the Court, at the request of defendant, gave to the jury the following instructions, to wit:

II.

In this action the plaintiff claims that he sustained injury through negligence of the defendant company, the plaintiff assigns negligence of the defendant as the cause of such injury; and the law requires that he prove such negligence. As the plaintiff he has the affirmative of that issue, and unless plaintiff makes his proof and shows negligence on the part of the defendant by the preponderance of the whole evidence, he cannot recover, and your verdict must be for the defendant.

III.

The defendant pleads by its answer that it was guilty of no negligence, and second, that plaintiff was not exercising ordinary care. I instruct you that the interposition of this second defense by defendant must not be in any way taken by you as an indication that the defendant admits that it was in any way negligent. Defendant has the right to present as many

defenses to this action herein as it sees fit, and its allegations in its answer that the plaintiff contributed to the accident by his own want of care is not to be taken as an admission by defendant that it was guilty of any negligence whatsoever.

IV.

Defendant by its answer alleges that it was free from negligence, and also that the plaintiff was guilty of contributory negligence. If you find that either of those defenses [197] is true, then I charge you that as a matter of law your verdict must be returned in favor of the defendant. That is to say, if you believe that the defendant was not guilty of negligence, then irrespective of all other questions, your verdict must be for the defendant in this case. But, on the other hand, should you believe from the evidence that defendant was negligent, and if you should further find from the evidence that plaintiff was not exercising the care and caution which an ordinarily prudent and careful man would have exercised under the same circumstances, and that his failure to exercise such ordinary care and caution contributed directly or proximately to the injuries, then plaintiff cannot recover and your verdict must be for the defendant.

V.

There is no evidence in this case that defendant knew that plaintiff was attempting to board said train.

VI.

If from the evidence you believe that the plaintiff, without fault on the part of the defendant, was pushed or jostled by a crowd while he was boarding

or attempting to board the said car, and thereby prevented from getting entirely onto said car, and pushed therefrom to the ground, by said crowd, without fault of the defendant, then I instruct you that plaintiff cannot recover against the defendant railroad herein.

VII.

If, under all the circumstances surrounding him, the plaintiff at the time of the said accident did not act as a prudent person under such circumstances would have acted, and [198] if his lack of ordinarily prudent conduct contributed to his injury, if any, then you can award him nothing herein, and your verdict must be for the defendant.

VIII.

The fact that I have instructed or may instruct you upon the measure of damages in this action is not to be taken by you as any indication that I believe or do not believe that the plaintiff in this action is entitled to recover damages herein. Such instructions are given to you because it is the duty of the Court to charge you upon all the law of the case; and if from the evidence you believe that the defendant was not guilty of negligence, or that negligence on the part of the plaintiff contributed directly or proximately to the injuries, or that the plaintiff assumed the risk of such injuries, then I charge you that you will disregard any and all instructions given you by me on the measure of damages in this action.

IX.

You are instructed that it is negligence to attempt to board a moving car.

IXa.

One who voluntarily attempts to board a moving car assumes all risk of injury therefrom.

X.

If from the evidence you believe that at the time of the said accident the plaintiff voluntarily attempted to board the defendant's train while the same was still in motion, and that by reason of a crowd thereabout he was unable to board said car, but attempted to cling to the handle-bar [199] thereof while the same was in motion, then I charge you that to attempt to cling to a car in such position and so to ride thereon was negligence on his part.

XI.

If you believe from the evidence that the plaintiff negligently undertook to board the defendant's car while the same was in motion, and that by reason of such attempt he was injured, then I instruct you that the plaintiff cannot recover herein, and your verdict must be in favor of the defendant.

XIII.

If from the evidence you believe that the plaintiff was attempting to board the said train while the same was in motion, and that his injury was due entirely to the fault of some other person or persons, and without fault of the defendant, and that he was thrown to the ground and under the said car without fault of the defendant, but by reason of the act solely of some other person or persons, then I charge you that the defendant is not answerable here for any injuries plaintiff may have received, and your verdict must be in favor of the defendant.

XIV.

While a railroad company must exercise the highest degree of care and caution to avoid injuries to its passengers, it is not required to guarantee or insure protection from the disorder or violence of mobs or immense and unruly crowds. The impossible is not required of such company. If you believe from the evidence that at the time of plaintiff's said accident he was pushed under the said car by an unruly [200] crowd which the defendant was unable to control or restrain, and was thereby and without fault of the defendant injured, then I instruct you that regardless of whether or not his injuries were great or small, the defendant is not liable therefor, and your verdict must be in its favor in this case.

XIV.

A railroad company is not required to guarantee or insure protection from the disorder or violence of mobs or immense and unruly crowds. The impossible is not required of such company. If you believe from the evidence that at the time of plaintiff's said accident he was pushed under the said car by an unruly crowd which the defendant was unable to control or restrain, and was thereby and without fault of the defendant injured, then I instruct you that regardless of whether or not his injuries were great or small, the defendant is not liable therefor, and your verdict must be in its favor in this case.

XV.

Passion, prejudice and sympathy have no place in your consideration of this case, nor in your deliberations thereon. Your duty is to hear and determine

this action unaffected by any such considerations; and the fact that the defendant is a corporation is not to be considered by you, but you will accord to it the same fair treatment as if it was a private individual.

XVI.

The defendant was not required to anticipate any possible surging or moving or unruly conduct, if any, of any crowd or persons at the said station to any greater extent [201] than was the said plaintiff.

XVII.

If you believe from the evidence that the said plaintiff was injured by reason of being pushed under the said train by a sudden onrush, if any, of any persons toward said train, which the said defendant did not know of or could not anticipate in advance of the happening of such event, but that such sudden onrush did occur, and was the sole cause of the said accident, then I charge you that plaintiff cannot recover damages of the defendant herein.

XVIII.

It is charged by plaintiff that the said defendant at the time in controversy propelled its said train into the said station at Paso Robles at a high and dangerous rate of speed, and at a rate of speed in excess of twenty miles per hour. The defendant denies this charge, and I instruct you that as to this allegation of negligence made by plaintiff against defendant, the burden of proof is upon said plaintiff, and if the said plaintiff shall not establish by a preponderance of the whole evidence in the case that the said train was negligently propelled into said station

at a high and excessive rate of speed, it will be your duty to find upon the said issue in favor of the defendant; that is, as to the said issue of negligent speed, it will be your duty to find that the said train was not carelessly or negligently propelled into said station at a high or dangerous rate of speed.

XIX.

You are instructed that until something may have [202] happened to advise it to the contrary, the defendant had a right to assume that any person at said station or waiting for said train would exercise ordinary care and prudence in their conduct.

XX.

You are instructed that if you find from the evidence that the said crowd at said depot was composed largely of soldiers, then defendant had a right to assume, until something should have advised it to the contrary, that said soldiers would be controlled and restrained, if necessary, by any officers, if any, who might then and there be present in uniform having authority or power to control the said soldiers.

XXII.

There is nothing in this case to indicate that any disorder or any indication of disorder existed in the crowd at said station prior to the time the train pulled alongside the same; and the defendant company was under no obligation to police or restrain or attempt to control the said crowd, prior to the arrival of said train at the said station. If, at that time, the injury to plaintiff resulted from a sudden movement or rushing of a portion of said crowd, which the said defendant could not reasonably have

anticipated or could not have guarded against by the exercise of any degree of care reasonable under the circumstances, then I charge you that the defendant is not to be held liable in this action, for the injuries sustained by the said plaintiff.

XXIII.

It is for you to determine from a preponderance of the evidence in this case, the question of the speed of the defendant's [203] train, and also the question of whether or not the said train was brought to a stop substantially at the usual stopping place of trains at said Paso Robles station. Upon this question, the burden of proof is on the plaintiff and unless the plaintiff sustains this burden of proof, and establishes by a preponderance of the evidence in the case, that the said train came into the said station at an excessive rate of speed, and that the said train did not stop at the usual stopping place, then I charge you that as to the said propositions of facts, unless plaintiff maintains his burden of proof aforesaid, it will be your duty to find upon said issues, in favor of the defendant company. And unless you further find from the evidence that the speed of the said train was the direct and proximate cause of some movement of the said crowd, as the direct and proximate result of which the plaintiff was injured, then I charge you that the question of the speed of the said train is immaterial in this case. If you believe from the evidence that the said train was running at a high rate of speed when it passed the said crowd, then you have the right to consider whether or not such a high rate of speed was itself an indication to

parties to attempt to board the said train, or to move or surge in said crowd, or whether it was exactly the opposite in its invitation or indication to said crowd and would have reasonably more of a tendency to prevent the said crowd from attempting to board or surging or moving toward the said train. The defendant had a right, of course, to bring the said train into the said station and to keep the said train moving past the said crowd, until it arrived at a proper stopping [204] place. And, if, under the circumstances, the accident resulted from the acts for those in the crowd over whom the defendant had no control, and from acts thereof which the defendant could not reasonably foresee or anticipate, then I charge you that your verdict must be returned in favor of the defendant.

XXIV.

If you believe from the evidence that the said train was carefully operated as the same was being brought into the said station or if from the evidence the same to your minds is equally balanced on the said question, then I charge you that the plaintiff has failed to sustain the burden of proof imposed upon him by law as a plaintiff, and as to the said issue, he must fail in this action.

XXV.

If from the evidence you believe that as the train approached the said station danger was reasonably apparent or should have been reasonably apparent to the plaintiff in the exercise of ordinary care, in the circumstances in which he found himself, and that he could then and there by the exercise of ordinary care

have extricated himself from such apparent danger and stayed away from dangerous proximity, if any, to the said track and train, and that he failed to do so, and that as the result thereof he negligently exposed himself to an apparent danger, and directly or proximately contributed to the injuries that resulted to him, then I charge you that he cannot recover in this action, and your verdict must be for the defendant. [205]

Additional Instructions.

And thereupon the Court, of its own motion, gave to the jury the following additional instructions:

The COURT.—These several instructions I have read to you, gentlemen, at the instance of the respective parties to this suit, because I believe they embody a correct statement of the law for your guidance. The action is based upon negligence on the part of the defendant, that is, upon the negligence charged in the complaint. Negligence is defined in law as the doing of that which a reasonably careful and prudent man would not have done under the like circumstances and conditions, or leaving undone that which a reasonably careful and prudent man would have done under the like circumstances and conditions. The degree of care which one person owes to another depends in a measure upon the relationship which exists between the parties. A common carrier owes to its passengers the duty to exercise the highest degree of care for their protection and safety which is consistent with the practicable operation of its road, and I charge you as a matter of law that, if you find from the testimony in this

case that the plaintiff was on the platform to take a train with a ticket in his pocket, he was, within the meaning of the rule I have stated to you, a passenger; that is, the railroad company owed him the same degree of care and protection that it owes to a passenger in actual transit. And if you find from a preponderance of the testimony in this case that the defendant was guilty of negligence, and that that negligence was the proximate [206] cause of the injury to the plaintiff, your verdict will be in favor of the plaintiff, unless you find that the plaintiff was guilty of contributory negligence; that is, unless you find that he failed to exercise that degree of care which a reasonably careful and prudent man would have exercised under the same circumstances and conditions.

I have defined to you the different duties which are imposed upon railroad companies by the common law and by the statutes of California. You must find from a preponderance of the evidence, not only that there was a breach of these statutory or common-law duties, but you must further find that such breach of duty was the direct and proximate cause of the injury to the plaintiff.

I don't know that it is necessary to give you any further instructions for your guidance, gentlemen, but in the event that you find for the plaintiff, it will be necessary for you to assess the amount of his recovery. That amount you cannot compute in dollars and cents. The law leaves that question to your sound sense and sober judgment. You will fully compensate him for any pain and suffering he has endured in the past; you will compensate him for

any pain and suffering he will endure in the future; you will compensate him for any loss he has sustained through the impairment of his earning capacity in the past, and you may compensate him for any loss he will sustain through the impairment of his earning capacity in the future; but, gentlemen, you must not conclude that his earning capacity is totally destroyed because he can no longer follow the life of a soldier. The law does not tolerate idleness; it compels [207] men to work at some other employment, and it is the duty of this plaintiff to earn money in some other vocation that he can follow in his present condition. In allowing a recovery you must further remember, gentlemen, that whatever sum you allow is paid in money at the present time, and that a dollar to-day is worth a great deal more than a dollar to be earned five, ten, fifteen, twenty or twenty-five years in the future.

With these rules for your guidance, I submit the case to you. You are the sole judges of the facts in the case and of the credibility of the witnesses. If I have commented upon the facts at any stage of the trial, and my comments do not agree with your own conclusions from the testimony, it is your sworn duty to follow your own judgment and not mine.

In arriving at your verdict, you will carefully consider and compare all the testimony; you will observe the demeanor of the witnesses on the stand; their interest in the result of your verdict if any such interest is shown; their opportunity for hearing, seeing and knowing the facts to which they have testified; the probability of the truth of their testi-

mony; their candor or lack of candor, their bias or prejudice, or the absence of either of these qualities, and all the facts and circumstances given in evidence or surrounding the witnesses at the trial. And if you are satisfied, from a consideration of the testimony, that any witness has wilfully testified falsely to a material fact, you are at liberty to disregard the testimony of that witness entirely except in so far as he may be corroborated by other credible testimony, or by other known facts in the case. You are not [208] to reach the conclusion, however, that a witness has wilfully testified falsely because he may have erred as to the speed of a train, or as to where it stopped, or as to the number of people in a crowd. Such errors are consistent with entire integrity of purpose. Before you are at liberty to reject the testimony of a witness, you must believe that he wilfully and corruptly testified falsely.

All the instructions given by the Court were asked for by the jury, were reduced to writing, and by consent of both counsel taken by the jury to the jury-room, during ^{their} ~~this~~ ^S deliberation, without any exceptions ^{than} ~~taken~~ as hereinbefore stated.

And the said defendant, within the time allowed by law and rule of Court, and as extended by order of Court, hereby proposes the foregoing bill of exceptions, containing all the proceedings had on the trial of said cause, and asks that the same be settled and allowed as correct.

J. W. McKINLEY,

R. C. GORTNER,

Attorneys for Defendant. [209]

**[Stipulation and Order Settling and Allowing Bill of
Exceptions.]**

It is hereby stipulated that the foregoing Bill of Exceptions may be settled and made a part of the record herein.

Dated December 4th, 1912.

EDWARD E. COTHRAN,

Attorney for Plaintiff.

J. W. McKINLEY,

R. C. GORTNER,

Attorneys for Defendant.

The foregoing Bill of Exceptions, duly proposed and agreed upon by the counsel for the respective parties, is correct in all respects, and is hereby approved, allowed and made a part of the record herein.

Dated this 6th day of December, 1912.

FRANK H. RUDKIN,

Judge. [210]

[Admission of Service of Bill of Exceptions.]

(Endorsed:)

*In the District Court of the United States, Southern
District of California, Southern Division.*

No. 1664—CIVIL.

JOHN WILBUR WARD,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY,

Defendant.

BILL OF EXCEPTIONS.

Due and timely service of a copy hereof is hereby admitted this Dec. 3d, 1912.

EDWARD E. COTHRAN,

Atty. for Plff.

E. E. COTHRAN, Esq., Attorney for Plaintiff.

Messrs. J. W. McKINLEY and R. C. GORT-

NER, Attorneys for Defendant.

ELIZA P. HOUGHTON,

Court Reporter and Notary Public, 836 Title Insurance Building, Los Angeles, Cal.

Filed Dec. 6, 1912. Wm. M. Van Dyke, Clerk.
By Chas. N. Williams, Deputy Clerk. [211]

*In the District Court of the United States, Southern
District of California, Southern Division.*

JOHN WILBUR WARD,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,
tion,

Defendant.

Petition for Writ of Error and Supersedeas.

The said defendant, Southern Pacific Company, a corporation in the above-entitled cause, feeling itself aggrieved by the verdict of the jury and the judgment thereon entered on the 15th day of November, 1912, comes now and files herewith an assignment of errors, and respectfully petitions the above-named court for its allowance of a Writ of Error, to review

in the United States Circuit Court of Appeals for the Ninth Circuit, the said judgment, to the said District Court of the United States, Southern District of California, Southern Division, under and according to the laws of the United States, in that behalf made and provided, and also that an order be made fixing the amount of security which the defendant shall give and furnish upon said Writ of Error, and that upon the giving of such security, all further proceedings in this court be suspended until the determination of said Writ of Error by the United States District Court of Appeals, for the Ninth Circuit, and that said Judgment may be reversed.

Your petitioner further represents that a motion for new trial was made in said cause within the time allowed by law and the same heard and disposed of by the denial thereof on the 2d day of December, 1912.

Wherefore, your petitioner prays that the said Writ of Error be issued, and that the same operate as a supersedeas, and that an order be made fixing the bond upon the said supersedeas.

Respectfully submitted,

J. W. McKINLEY,

R. C. GORTNER,

Attorneys for Petitioner. [212]

[Order Allowing Writ of Error, etc.]

On this 12th day of December, 1912, came the defendant in the above-entitled action by its attorneys, and filed herein and presented to the Court its petition praying for the allowance of a Writ of Error, intended to be urged by it, praying also that a tran-

script of the record and proceedings, and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals, for the Ninth Circuit, and that such other and further proceedings may be had as may be proper in the premises; on consideration whereof, the Court does allow the Writ of Error, upon the said defendant giving Bond according to Law, in the sum of Twenty Thousand *Thousand* Dollars, which shall operate as a supersedeas bond.

FRANK H. RUDKIN,

Judge.

[Endorsed]: C. C. No. 1664. United States District Court, Southern District of California, Southern Division. John Wilbur Ward, Plaintiff, vs. Southern Pacific Company, a Corporation, Defendant. Petition for Writ of Error and Supersedeas and Order. Received copy of the within Petition this 12th day of December, 1912. ———, Attorney for Plaintiff. Filed Dec. 12, 1912. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. J. W. McKinley, 434 Pacific Electric Bldg., cor. 6th and Main Sts. Los Angeles, Cal., Attorney for Defendant. [213]

*In the District Court of the United States, Southern
District of California, Southern Division.*

JOHN WILBUR WARD,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a Corpora-
tion,

Defendant.

Assignment of Errors.

Comes now the defendant above named and files the following statement and assignment of errors upon which it will rely upon its prosecution of the Writ of Errors in the above-entitled cause; petition for this Writ is filed at the same time with this assignment:

I.

The Court erred in overruling the objection of defendant to the question as to how many men there were at the military maneuvers at Atascadero, put to the witness H. B. Light, as set forth in Exception No. 1, of the Bill of Exceptions; for the reason that the same was immaterial and irrelevant.

In this behalf, the following is the full substance of the said question, and the witness' answer thereto:

“Q. About how many men were there, including officers?

A. I should say about ten thousand. In that neighborhood. They consisted of soldiers and officers mostly.”

II.

The Court erred in overruling the objection of the

defendant to the following statement and answer made by the witness H. B. Light, with reference to a schedule said to have been gotten out by the railroad company for the purpose of showing the camping ground at Atascadero, as set forth in Exception No. 2 of said Bill of Exceptions, for the reason that said statement [214] and answer of said witness were a conclusion, and that the said paper would speak for itself if admitted in evidence.

In this behalf, the following is the full substance of said answer and statement of said witness:

“I have seen this document, marked Plaintiff’s Exhibit 3, before. It is a schedule that was gotten out by the railroad companies at the time, for the purpose of showing the camping grounds.”

III.

The Court erred in overruling the objection of the defendant to the following statement and answer made by the witness H. B. Light, as to the contents of Plaintiff’s Exhibit 3, and as to copy thereof having been sent to him, as set forth in Exception No. 3 of this Bill of Exceptions; for the reason that the said paper was the best evidence, and that if introduced it would speak for its contents.

In this behalf, the following is the full substance of the said statement and answer of said witness:

“I first saw this paper, Plaintiff’s Exhibit 3, marked on the outside, ‘U. S. Army Maneuvers, Camp at Atascadero, near Paso Robles Hot Springs, California, October 10, Southern Pacific,’ when five of those were sent to me for Company ‘B,’ containing a map and a special schedule between Atascadero and

Paso Robles, the rate of fare and the nature of the tickets that would be issued during the months of September and October.”

IV.

The Court erred in overruling the objection of the defendant to Plaintiff's Exhibit 3, offered in evidence, the same being a folder advertising the Army maneuvers at camp Atascadero; advertising Paso Robles Hot Springs, and containing a schedule of trains at Atascadero and Paso Robles, all as set forth in Exception No. 4, of the said Bill of [215] Exceptions; for the reason that the same unnecessarily encumbered the record, and was immaterial and irrelevant.

V.

The Court erred in overruling the objection of the defendant to Plaintiff's Exhibit IV, offered in evidence, being a poster concerning the U. S. Army Maneuvers at Camp Atascadero, as set forth in Exception No. 5 of said Bill of Exceptions; for the reason that the same was incompetent, irrelevant and immaterial.

VI.

The Court erred in overruling the objection of the defendant to the question put to the witness for plaintiff H. B. Light, as set forth in Exception No. 6 of said Bill of Exceptions, with reference to how he, the said witness Light, got on the said train at Paso Robles, about twenty-five minutes after the said accident had happened; for the reason that the same was irrelevant and immaterial.

In this behalf, the following is the full substance

of said question and the witness' answer thereto:

“How did you get on the train?

A. Before I got a position, got in a position where I could get on the train, or in the baggage-car, or these coaches, the train had started, and I ran—I got to the last, and got the last coach, and I ran along, probably ten or twelve feet before I managed to get on the step after getting hold of the handle. I stood on the step possibly four or five minutes before I had an opportunity to wedge myself on the platform; and the men, of course, being an officer, they pressed aside, and made as much room as they could, and pushed me through by the arms, and got me on my back, and tried to pull me in, like you would on a crowded car. I stood on the platform, and it took me maybe probably ten or fifteen minutes to get inside of the car. The condition of the car was packed; there was not room for anybody to squeeze through from one end of the [216] car to the other. There were men sitting on the sides of the seats, standing between the people that had occupied the train before it arrived at Paso Robles, standing in back of them and in front of them.”

VII.

The Court erred in denying the motion of defendant, to strike out the answer of the said witness H. B. Light, as to how he got on the said train twenty-five minutes or so after the said accident had happened, and as to his difficulties in boarding the same and as to the train starting before he had completely boarded the same, and as to the condition of the said train and as to the fact that the same was packed and crowded

and that there was not room for anybody to squeeze through from one end to the other; all as set forth in Exception No. 7 of said Bill of Exceptions; for the reason that the same was irrelevant and immaterial.

In this behalf, the said answer and statement of said witness is as follows:

“Before I got a position, got in a position where I could get on the train, or in the baggage-car, or these coaches, the train had started, and I ran—I got to the last, and got the last coach, and I ran along probably ten or twelve feet before I managed to get on the step after getting hold of the handle. I stood on that step possibly four or five minutes before I had an opportunity to wedge myself on the platform; and the men, of course, being an officer, they pressed aside and made as much room as they could, and pushed me through by the arms, and got me on my back and tried to pull me in, like you would on a crowded car. I stood on the platform, and it took me maybe probably ten or fifteen minutes to get inside of the car. The condition of the car was packed; there was not room for anybody to squeeze through from [217] one end of the car to the other. There were men sitting on the sides of the seats, standing between the people that had occupied the train before it arrived at Paso Robles, standing in back of them and in front of them.”

VIII.

The Court erred in overruling the objection of the defendant to the question as to whether or not the witness William H. Anderson had gone from Atascadero to Paso Robles, on an excursion ticket, as set

forth in Exception Number 8 of said Bill of Exceptions; for the reason that the same called for a conclusion of the witness, and was incompetent, irrelevant and immaterial.

In this behalf, the following is the full substance of said question, and the witness' answer thereto:

"Q. You say it was an excursion ticket, was it?

A. Yes, sir."

IX.

The Court erred in overruling the objection of the defendant to the question as to what kind of a light the locomotive had that night, put to the witness J. L. Anderson, as set forth in Exception No. 9, of said Bill of Exceptions; for the reason that the same was immaterial and irrelevant.

In this behalf, the following is the full substance of said question, and the witness' answer thereto:

"Q. Do you remember what kind of a light the locomotive had that night?

A. Well, it was not an electric light. It must have been—it was a very bright light, as you will see on any passenger train."

X.

The Court erred in overruling the objection of the defendant to the question as to how far the headlights on said engines [218] would throw, so that an engineer could see, put to the witness J. L. Anderson, as set forth in Exception No. 10 of said Bill of Exceptions; for the reason that the same was immaterial and irrelevant.

In this behalf, the following is the full substance

of said question and the witness' answer thereto:

“Q. Do you know how far these lights will throw so that an engineer can see?

A. A good four hundred yards.”

XI.

The Court erred in overruling the objection of the defendant to the question as to what was the condition of the platform of the train and the seats thereof after the said accident had occurred, put to the witness J. L. Anderson, as set forth in Exception No. 11 of said Bill of Exceptions; for the reason that the same was immaterial and irrelevant.

In this behalf, the following is the full substance of said question, and the witness's answer thereto:

“Q. What was the condition of the platform of the train and the seats, etc.?

A. The train was crowded; I went through about three cars, they were all in the same crowded condition.”

XII.

The Court erred in overruling the objection of the defendant to the question as to the speed at which the said train came in, put to the witness, Elijah H. Griffin, as set forth in Exception No. 12 of said Bill of Exceptions; for the reason that no foundation had been laid for the said witness to give an answer thereto.

In this behalf, the following is the full substance of said question, and the witness's answer thereto:

Q. In your judgment, at what speed did the train come in?

A. I don't know just exactly how fast the train

came in, [219] but I know it was coming in fast. It came in faster than you generally see a train coming into a station. I have seen several trains come into stations, and I don't believe I ever saw one come into a station as fast as that one came in."

XIII.

The Court erred in overruling the objection of the defendant to the question as to what was the condition of the second day coach after the accident had already happened, as put to the witness Samuel Young, as set forth in Exception No. 13 of said Bill of Exceptions; for the reason that the same was immaterial.

In this behalf the following is the full substance of said question, and the witness's answer thereto:

"Q. What was the condition of that coach?

A. The first coach was crowded so I could see from where I was standing there was no use trying to get on that; and when I tried to get on the second coach it was crowded, and I just did get in, and I stood up all the way into Atascadero."

XIV.

The Court erred in overruling the objection of the defendant to the question as to whether or not there was any man representing the Southern Pacific Company or any agent attempting in any way to guide or direct the crowd about boarding the train, put to the witness Samuel Young, as set forth in Exception No. 14 of said Bill of Exceptions; for the reason that the same was immaterial and irrelevant, and that it appeared from the plaintiffs own proof that there was not any disorder or anything calling upon the South-

ern Pacific Company to restrain or control a crowd that did not need any control or restraint.

In this behalf the following is the full substance [220] of said question, and the witness's answer thereto:

“Q. Was there any man representing the Southern Pacific Company, or any agent out there, attempting in any way to guide or direct that crowd about boarding the train?

A. There was no one that I could see at all.”

XV.

The Court erred in overruling the objection of defendant to the question as to whether the witness heard anyone say anything to the crowd about boarding that train, put to the witness Samuel Young, as set forth in Exception No. 15 of said Bill of Exceptions; for the reason that the same was immaterial and irrelevant, and that it appeared from plaintiff's own proof that there was not any disorder, or anything calling upon the Southern Pacific to restrain or control a crowd that did not need any control or restraint.

In this behalf, the following is the full substance of said question, and the witness's answer thereto:

“Q. Did you hear anyone say anything to the crowd about boarding that train? A. No, sir.”

XVI.

The Court erred in overruling the objection of defendant to the question as to whether or not the witness was in a position to see any accession to the crowd about the time the train came in, put to the witness Henry D. Thomason, as set forth in Excep-

tion No. 16 of said Bill of Exceptions; for the reason that the same called for the conclusion of the witness and invaded the province of the jury.

In this behalf, the following is the full substance of the said question, and the witness's answer thereto:

“Q. State whether or not you were in a position to see any accession to the crowd about the time the train came in, in the position in which you and Captain Ward stood.

A. I could see if there was a large accession. I don't suppose [221] I could have told whether a few men joined the crowd, but any large accession, I could have seen. There was no large accession of men *of men* to that crowd, to my knowledge, as the train came in.”

XVII.

The Court erred in overruling the objection of the defendant to the question put to the witness Henry D. Thomason, as set forth in Exception No. 17 of said Bill of Exceptions, in which he was asked why he said that the speed of the train was in the neighborhood of twenty or twenty-five miles an hour; for the reason that an answer to such question was incompetent, irrelevant and immaterial, and called for a comment of the witness upon the value of his own testimony.

In this behalf, the following is the full substance of said question and the witness's answer thereto:

“Q. Why do you say that?

A. I have boarded a good many trains under all circumstances, and in a good many stations throughout the United States. I can say that riding in an

automobile, I think I know about what twenty or twenty-five miles an hour speed is.”

XVIII.

The Court erred in overruling the objection of the defendant to the question as to whether or not the witness saw any agent, station agent, or representative or persons pretending to represent the railroad, or anybody else, at said station, who attempted in any way to regulate the said crowd or its admission to that train, that night, put to the witness Henry D. Thomason, as set forth in Exception Number 18 of said Bill of Exceptions; for the reason that the same was incompetent, irrelevant and immaterial.

In this behalf, the following is the full substance of said question and the witness's answer thereto:
[222]

“Q. Captain, did you see any agent, station agent, or representative or persons pretending to represent the railroad or anybody else there, who attempted in any way to regulate the crowd or its admission to that train that night? A. I did not.”

XIX.

The Court erred in overruling the objection of defendant to the question as to whether the witness heard any statement made by any agent or any person in behalf of the Southern Pacific Company or anybody in reference to the admission of that crowd, or of the manner in which they should take the train, put to the witness Henry D. Thomason, as set forth in Exception No. 19 of said Bill of Exceptions; for the reason that the same was incompetent and irrelevant, and immaterial.

In this behalf, the following is the full substance of said question, and the witness's answer thereto:

“Q. Did you hear any statement made by any agent or any person in behalf of the Southern Pacific, or anybody, with reference to the admission of that crowd, or of the manner in which they should take the train? A. I did not.”

XX.

The Court erred in overruling the objection of defendant to the question as to how many actual engagements of war the said plaintiff John Wilbur Ward had experienced, which question was put to the witness John Wilbur Ward, as set forth in Exception No. 20 of said Bill of Exceptions; for the reason that the same was immaterial and irrelevant.

In this behalf, the following is the full substance of said question and the witness's answer thereto:

“Q. State just generally without any details through how many actual engagements of war you have passed. A. Fifty-seven.” [223]

XXI.

The Court erred in overruling the objection of the defendant to the question as to what were the duties of the plaintiff with reference to Post Exchange, put to the plaintiff, John Wilbur Ward, as a witness in his own behalf, as set forth in Exception No. 21 of said Bill of Exceptions; for the reason that the same was immaterial and irrelevant.

In this behalf, the following is the full substance of said question and the witness' answer thereto:

“Q. What were your duties with reference to the Post Exchange?

A. The Post Exchange was a general store; sold nearly everything. I had entire charge and control of it, under the laws laid down by Congress and the Secretary of War, especially in regard to buying and directing the selling and receiving the funds which were brought in; and also the Post Exchange Council, of which I acted as secretary, and the Post Exchange Council consisted of all the company commanders in camp, approved by the Colonel."

XXII.

The Court erred in overruling the objection of defendant to the question as to whether or not there was an agent of the Southern Pacific at Atascadero on the 8th day of October, or prior to that time, during October or September, apart from the regular agent of the Southern Pacific Company, put to the plaintiff John Wilbur Ward, as a witness in his own behalf, as set forth in Exception No. 22 of said Bill of Exceptions; for the reason that the same is immaterial and irrelevant.

In this behalf, the following is the full substance of the said question, and the witness's answer thereto:

"Q. Captain, do you know whether or not there was an agent of the Southern Pacific at Atascadero, on the 8th day of [224] October and prior to that time, during October and September, apart from the regular agent of the Southern Pacific Company?

A. There were two agents there during the encampment."

XXIII.

The Court erred in overruling the objection of the defendant to the question put to the plaintiff John

Wilbur Ward, as a witness in his own behalf, as to whether he knew the number of trains that ran from Atascadero into Paso Robles, on October 8th, 1810, the same having been put to said witness as set forth in Exception No. 23 of said Bill of Exceptions; for the reason that same was immaterial and irrelevant.

In this behalf, the following is the full substance of said question and the witness's answer thereto:

“Q. Do you know the number of trains that ran from Atascadero into Paso Robles that day?

A. There were six passenger trains ran in the daylight hours between Atascadero and Paso Robles. Three of them were specials.”

XXIV.

The Court erred in overruling the objection of the defendant to the question as to the number of trains that ran from Paso Robles to Atascadero on the 8th day of October, put to the plaintiff John Wilbur Ward, as a witness in his own behalf, as set forth in Exception Number 24 of said Bill of Exceptions; for the reason that the same was immaterial and irrelevant.

In this behalf the following is the full substance of the said question and the witness's answer thereto:

“Q. Do you know the number of trains that ran from Paso Robles to Atascadero that 8th day of October?

A. I do not, except that I know that only one train went south after the special had taken the crowd up for this swimming event up to Paso Robles. That was the Sunset Limited due at 10:45.” [225]

XXV.

The Court erred in denying the motion of defendant to strike out the answer and statement of the said plaintiff, John Wilbur Ward, as a witness in his own behalf, as set forth in Exception No. 25 of said Bill of Exceptions; for the reason that the same was purely negative testimony, and incompetent and irrelevant.

In this behalf, the following is the full substance of the said statement of said witness:

“I do not, except that I know that only one train went South after the special had taken the crowd up for this swimming event up to Paso Robles. That was the Sunset Limited, due at 10:45.”

XXVI.

The Court erred in overruling the objection of defendant to the question put to the plaintiff John Wilbur Ward, as a witness in his own behalf, as set forth in Exception No. 26 of said Bill of Exceptions, with reference to whether or not he knew that the soldiers and officers of the United States Army and the National Guard at Paso Robles had bought a certain kind of a ticket; for the reason that the same is immaterial and irrelevant.

In this behalf, the following is the full substance of said question and the witness's answer thereto:

“Q. Do you know whether or not the soldiers and officers of the United States Army and the National Guard who were at Paso Robles that day bought this same kind of a ticket—return?

A. I know that a very large portion of them did.”

XXVII.

The Court erred in overruling the objection of the defendant to the question as to whether or not there was a swimming contest at Paso Robles on the evening of October 8th, 1910, put to the plaintiff John Wilbur Ward, as a witness [226] in his own behalf, as set forth in Exception No. 27 of said Bill of Exceptions; for the reason that the same was immaterial and irrelevant.

In this behalf, the following is the full substance of the said question and the witness's answer thereto:

“Q. I will ask you if you know whether or not there was a swimming event at Paso Robles on the evening of October 8th, 1910? A. Yes.”

XXVIII.

The Court erred in overruling the objection of defendant to the question put to John Wilbur Ward, plaintiff, as a witness in his own behalf, as to whether he heard anyone give any warning or any direction as to the manner in which the crowd should take the train, as set forth in Exception No. 28 of said Bill of Exceptions; for the reason that the same is immaterial, incompetent and irrelevant.

In this behalf, the following is the full substance of said question, and the witness's answer thereto:

“Q. Did you hear anyone give any warning or any direction as to the manner in which the crowd should take that train? A. No.”

XXIX.

The Court erred in overruling the objection of defendant to the question put to John Wilbur Ward, plaintiff, as a witness in his own behalf, as to whether

he saw any agent at the station or on the station premises that night as set forth in Exception No. 29 of the Bill of Exceptions; for the reason that the same was immaterial and irrelevant.

In this behalf, the following is the full substance of said question, and the witness's answer thereto:

"Q. Did you see any agent at the station or in the Station premises there that night?

A. I caught a glimpse of a man selling tickets, the only one there." [227]

XXX.

The Court erred in overruling the objection of defendant and in permitting the plaintiff John Wilbur Ward, as a witness in his own behalf, to remove his trousers and exhibit to the jury the stump of his amputated leg, as set forth in Exception No. 30 of said bill of exceptions; the same being incompetent, and immaterial and constituting a dramatic exhibition, improper in a jury trial, not susceptible of cross-examination, and not throwing any light upon said case and being merely for dramatic effect.

XXXI.

The Court erred in overruling the objection of defendant to the question put to John Wilbur Ward, plaintiff in his own behalf, as set forth in Exception No. 31 of said Bill of Exceptions, as to whether or not the injury in question had affected his standing in the army; for the reason that the same was immaterial and irrelevant.

In this behalf, the following is the full substance of the said question and the witness's answer thereto:

"Q. I will ask you whether or not this injury af-

fecting your standing in the army?

A. Yes. Closed my career in the army."

XXXII.

The Court erred in overruling the objection of defendant to the introduction of the American Tables of Mortality, as set forth in Exception No. 32 of said Bill of Exceptions, for the reason that the same was irrelevant and immaterial.

XXXIII.

The Court erred in overruling the objection of defendant to the question put to John Wilbur Ward, plaintiff, as a witness in his own behalf, as set forth in Exception No. 33 [228] of said Bill of Exceptions, as to the age at which officers of the United States Army are retired; for the reason that the same was purely speculative.

In this behalf, the following is the full substance of said question, and the witness's answer thereto:

"Q. Captain, do you know the age at which officers of the United States Army are retired?

A. It is under an Act of Congress. At sixty-four years of age. I was receiving a salary of \$2,400.00 per year, besides allowances and etc."

XXXIV.

The Court erred in overruling the objection of defendant to the question put to John Wilbur Ward, plaintiff, as a witness in his own behalf, as to the order of promotion that he would have been permitted to enjoy, if he had remained in the army; for the reason that the same enters the realm of speculation and conjecture and was incompetent. The

same being set forth in Exception No. 34 of said Bill of Exceptions.

In this behalf, the following is the full substance of the said question, and the witness's answer thereto :

“Q. Captain, just state to the jury the order of promotion that you would have been permitted to enjoy had you remained in the army.

A. The promotions in the army are made by Act of Congress and at a certain time.”

XXXV.

The Court erred in overruling the objection of defendant to the question put to John Wilbur Ward, plaintiff, as a witness in his own behalf, as to what was the order of promotion in the army that he would have been permitted to enjoy had he remained therein, as set forth in Exception No. 35 of said Bill of Exceptions; for the reason that the same was not the best evidence. [229]

In this behalf the following is the full substance of said question, and the witness's answer thereto :

“Q. Just state what it is; the fact, that is what I am calling for.

A. The promotion of second and first lieutenant and captain, major, lieutenant-colonel, colonel, are all by law. From the colonels, the generals are selected, and with each promotion there is an increase of pay; also with the years of service; there is a ten per cent increase of pay with every five years of service up to twenty years. There is an allowance in money, when an officer is not living in a military post and furnished a house. According to the different ranks, he gets a certain money allowance. That is all by

law. And he also gets his fuel, light bills paid, but that is not commuted in money; and there are several privileges, but no other ones commuted and paid in actual money.”

XXXVI.

The Court erred in overruling the objection of defendant to the question put to John Wilbur Ward, plaintiff, as a witness in his own behalf, as to a computation based upon the statement that he had given of the amount of money he would have earned by a fixed rule of promotion to the age sixty-four, as set forth in Exception No. 36 of said Bill of Exceptions; for the reason that the same was incompetent, irrelevant and immaterial and invading the province of the jury.

In this behalf the following is the full substance of the said question and the witness's answer thereto:

“Q. Have you made a computation based upon the statements which you have just given of the amount of money you would have earned by the fixed rule of promotion to the age of sixty-four when you would have been retired?

A. I made the computation in my rank as captain, and it amounted to \$106,000.00 up to the date of sixty-four years of age.” [230]

XXXVII.

The Court erred in overruling the motion of the defendant for a judgment of nonsuit, made at the close of the plaintiff's case, as set forth in Exception No. 37 of said Bill of Exceptions; the same being made on the ground that there was no proof establishing or tending to establish any negligence on the

part of the defendant Company; on the further ground that there was proof establishing or tending to establish any negligence on the part of the company defendant, which directly or proximately contributed to or resulted in the injury to the said plaintiff; on the further ground that the proof affirmatively established that the injury sustained by the plaintiff was directly and proximately caused by the act of some third person, over whom the defendant had no control; and on the further ground that the proof affirmatively established that plaintiff himself failed to exercise ordinary care or caution for his own safety, and thereby directly and proximately contributed to the happening of the accident.

XXXVIII.

The Court erred in refusing to instruct the jury as requested by defendant's requested instruction numbered I, as set forth in Exception Number 39 of said Bill of Exceptions, as follows, to wit:

"You are instructed in this action to return your verdict in favor of the defendant."

XXXIX.

The Court erred in refusing to instruct the jury as requested by defendant's requested instruction numbered XX, as set forth in Exception Number 40 of said Bill of Exceptions, as follows:

"The degree of care owed by a railroad company to those upon a station platform, who may intend to become passengers on a train, is not the same degree of care which the railroad [231] company owes to those who are upon the train or in transit. The degree of care owed to those upon a station platform is

a reasonable degree of care, and not that which the law characterizes as the highest degree of care or foresight.”

XL.

The Court erred in giving to the jury Instruction E, set forth in the Bill of Exceptions, to which the said defendant duly excepted, the same being entirely immaterial to said cause and improper, as leading the jury to a consideration of whether or not the defendant was negligent, in respect to some matter having no proximate bearing upon the happening of the said accident; the said instruction being as follows, to wit:

“You are instructed that every railroad corporation must start and run its cars, for the transportation of persons at such regular times as it shall fix by public notice, and must furnish sufficient accommodation for the transportation of all such passengers, as within a reasonable time previous thereto, offer for transportation at stopping places established for receiving and discharging way passengers; and must transport such passengers at, from and to such places on the due payment of fare therefor.”

XLI.

The Court erred in giving to the jury Instruction F, set forth in the Bill of Exceptions, to which the said defendant duly excepted, the same being entirely immaterial to said cause, and improper, as leading the jury to a consideration of whether or not the defendant was negligent, in respect to some matter having no proximate bearing upon the happening of the said accident; the said instruction being as follows, to wit:

“You are also instructed that a carrier of persons for [232] reward is bound to provide vehicles safe and fit for the purposes to which they are put; that such carrier of persons must not overcrowd or overload his vehicle; that such carrier of persons must provide everything necessary for their safe carriage, and must exercise to that end a reasonable degree of skill.”

XLII.

The Court erred in giving to the jury Instruction G, set forth in the Bill of Exceptions, to which the said defendant duly excepted, the same being entirely immaterial to said cause and improper, as leading the jury to a consideration of whether or not the defendant was negligent, in respect to some matter having no proximate bearing upon the happening of the said accident; the said instruction being as follows, to wit:

“You are further instructed that every railroad corporation must furnish, on the inside of its passenger cars, sufficient room and accommodation for all passengers to whom tickets are sold for any one trip and for all persons presenting tickets entitling them to travel thereon.”

XLIII.

The Court erred in giving to the jury Instruction H, set forth in the Bill of Exceptions, to which the said defendant duly excepted, the same being entirely immaterial to said cause and improper, as leading the jury to a consideration of whether or not the defendant was negligent, in respect to some matter having no proximate bearing upon the happening of the

said accident; the said instruction being as follows, to wit:

“You are further instructed that a common carrier of persons for reward must provide a sufficient number of vehicles to accommodate all the passengers who can be reasonably expected to require carriage at any one time, and that such [233] common carrier of persons must provide every passenger with a seat.”

XLIV.

The Court erred in giving to the jury Instruction M, set forth in the Bill of Exceptions, to which the said defendant duly excepted, the same being entirely immaterial to said cause, and improper, as leading the jury to a consideration of whether or not the defendant was negligent, in respect to some matter having no proximate bearing upon the happening of the said accident; the said instruction being as follows, to wit:

“I also instruct you that it is the duty of every public carrier of passengers to employ sufficient servants for the protection of such passengers, and it is under obligations to take due care to secure the safety of a passenger who is upon its premises peaceably for the purpose of boarding its trains.”

XLV.

The Court erred in giving to the jury Instruction N, set forth in the Bill of Exceptions, to which the said defendant duly excepted, the same being entirely immaterial to said cause, and improper, as leading the jury to a consideration of whether or not the defendant was negligent, in respect to some matter

having no proximate bearing upon the happening of the said accident; the said instruction being as follows, to wit:

“You are further instructed that if it is shown that two parties have contributed to the injury of a third person, then notwithstanding the act of one of such two parties may have been reckless and that of the other simply manifesting the want of ordinary care, neither of such parties is relieved of liability for an injury to such third person who was not himself guilty of contributory negligence. [234]

And upon the foregoing assignment of errors, and upon the record in said cause, the said defendant prays that said verdict and judgment may be reversed.

J. W. McKINLEY,
R. C. GORTNER,
Attorneys for Defendant.

[Endorsed]: C. C. No. 1664. United States District Court, Southern District of California, Southern Division. John Wilbur Ward, Plaintiff, vs. Southern Pacific Company, Defendant. Assignment of Errors. Filed Dec. 12, 1912. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. J. W. McKinley, R. C. Gortner, Attys. for Defendant, 432 P. E. Bldg., Los Angeles, Cal. [235]

[Bond for Supersedeas.]

*In the District Court of the United States, Southern
District of California, Southern Division.*

JOHN WILBUR WARD,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a Corpora-
tion,

Defendant.

KNOW ALL MEN BY THESE PRESENTS:
That we, Southern Pacific Company, as principal,
and National Surety Company, a corporation of New
York, N. Y., as surety, are held and firmly bound
unto John Wilbur Ward, in the full and just sum of
Twenty Thousand Dollars, to be paid to the said
John Wilbur Ward, his heirs, executors, administra-
tors or assigns, to which payment, well and truly to
be made, we bind ourselves, our successors and as-
signs, jointly and severally by these presents.

Sealed with our seals, and dated this 13th day of
December, in the year of our Lord nineteen hundred
twelve.

WHEREAS, lately, at the July term, 1912, of
the said District Court of the United States, South-
ern District of California, Southern Division, in a
suit depending in said Court between John Wilbur
Ward, plaintiff, and Southern Pacific Company,
defendant, a judgment was rendered against the said
Southern Pacific Company, defendant, and the said
Southern Pacific Company defendant in said action,

has obtained from the United States Circuit Court of Appeals, a Writ of Error to reverse the judgment in the aforesaid suit, and a citation directed to the said John Wilbur Ward, citing and admonishing him to be and appear in the said United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, California, not exceeding thirty days after the date of said citation; [236]

NOW the condition of the above obligation is such that if the said Southern Pacific Company, the defendant in said action, plaintiff in error as aforesaid, shall prosecute said Writ of Error to effect and answer all damages and costs, if it fails to make good its plea, then the above obligation to be void; else to remain in full force and virtue.

SOUTHERN PACIFIC COMPANY. [Seal]

Per J. W. McKINLEY,

Its Attorney.

NATIONAL SURETY COMPANY,

By CATESBY C. THOM,

Its Attorney in Fact. [Seal]

State of California,

County of Los Angeles,—ss.

On this 13th day of December, in the year one thousand nine hundred and twelve, before me, William M. Curran, a notary public in and for said county and State, residing therein, duly commissioned and sworn, personally appeared Catesby C. Thom, known to me to be the duly authorized attorney in fact of National Surety Company, and the same person whose name is subscribed to the within instrument as

the attorney in fact of said company, and the said Catesby C. Thom, acknowledged to me that he subscribed the name of National Surety Company there-to as principal, and his own name as attorney in fact.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[Seal]

WILLIAM M. CURRAN,

Notary Public in and for Los Angeles County, State of California.

Approved Dec. 13th, 1912.

FRANK H. RUDKIN,

Judge.

[Endorsed]: C. C. No. 1664. United States District Court, Southern District of California, Southern Division. John Wilbur Ward, [237] Plaintiff, vs. Southern Pacific Company, a Corporation, Defendant. Bond for Supersedeas. Received copy of the within this 12th day of December, 1912. ———, Attorney for Plaintiff. Filed Dec. 13, 1912. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. J. W. McKinley, 434 Pacific Electric Bldg., Cor. 6th & Main Sts., Los Angeles, Cal., Attorney for Defendant. [238]

[Certificate of Clerk U. S. District Court to
Transcript of Record, etc.]

*In the District Court of the United States of America,
in and for the Southern District of California,
Southern Division.*

C. C. No. 1664.

JOHN WILBUR WARD,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,
Defendant.

I, Wm. M. Van Dyke, Clerk of the District Court of the United States of America, in and for the Southern District of California, do hereby certify the foregoing two hundred and thirty-eight (238) pages, numbered from 1 to 238, inclusive, and comprised in one volume, to be a full, true and correct copy of the pleadings and of all papers and proceedings upon which the judgment was made and entered in said cause, and also of the Judgment, Bill of Exceptions, Petition for Writ of Error and Supersedeas and Order allowing, Assignment of Errors, and bond on Writ of Error in the above and therein entitled cause, and that the same together constitute the record in said cause as specified in the praecipe filed in my office on behalf of [239] the defendant by its attorneys of record.

I do further certify that the cost of the foregoing record is \$123.45, the amount whereof has been paid me by the Southern Pacific Company, a corporation, defendant in said cause.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the District Court of the United States of America, in and for the Southern District of California, Southern Division, this 15th day of February in the year of our Lord one thousand nine hundred and thirteen and of our Independence the one hundred and thirty-seventh.

[Seal]

WM. M. VAN DYKE,

Clerk of the District Court of the United States, in
and for the Southern District of California.

[240]

[Endorsed]: No. 2249. United States Circuit Court of Appeals for the Ninth Circuit. Southern Pacific Company, a Corporation, Plaintiff in Error, vs. John Wilbur Ward, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Southern District of California, Southern Division.

Filed February 20, 1913.

FRANK D. MONCKTON,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

**[Order Enlarging Time to March 1, 1913, to Docket
Cause and File Record Thereof.]**

*In the United States Circuit Court of Appeals, Ninth
Judicial Circuit.*

SOUTHERN PACIFIC COMPANY,

Plaintiff in Error,

vs.

JOHN WILBUR WARD,

Defendant in Error.

Good cause appearing therefor, it is hereby ordered, that the time heretofore allowed said plaintiff in error to docket said cause and file the record thereof with the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, be and the same is hereby enlarged and extended to and including the 1st day of March, 1913.

Dated at Los Angeles, December 30th, 1912.

OLIN WELLBORN,

United States District Judge for the Southern District of California.

[Endorsed]: No. 2249. United States Circuit Court of Appeals for the Ninth Circuit. Southern Pacific Company, Plaintiff in Error, vs. John Wilbur Ward, Defendant in Error. Order Under Rule 16 Enlarging Time to File Record Thereof and to Docket Case. Filed Jan. 2, 1913. F. D. Monckton, Clerk. Refiled Feb. 20, 1913. F. D. Monckton, Clerk.

No. 2249.

United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

Southern Pacific Company, a corporation,

Plaintiff in Error,
vs.

John Wilbur Ward,

Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

The above entitled action was brought by the defendant in error, as plaintiff below, in the United States District Court of the Southern District of California, Southern Division, for personal injuries sustained by him at Paso Robles, California, on October 8th, 1910. An encampment of soldiers of the state militia and the United States regular army was being held at Atascadero, a few miles south of Paso Robles. A considerable number of these soldiers, together with plaintiff, who was an officer, and other officers, had made the trip

to Paso Robles on this day, on tickets good for their return within two days. [Tr. p. 88.] Eight trains were run from Atascadero to Paso Robles and eight from Paso Robles to Atascadero daily, on special schedule provided for the space of time during this encampment, from October 1st to 15th, 1910. [Tr. pp. 34-5.] It was shown that this special schedule had been made generally public among the soldiers. [Tr. p. 33.] Under this announced service, several hundred regulars and militiamen went up to Paso Robles during the day of the 8th, on various northbound trains. There were amusements at Paso Robles Hot Springs; among other things, band concerts and a swimming contest, not shown in any way to be connected with the railroad company.

About 10 o'clock at night on October 8th, presumably after the entertainments had ceased, a crowd commenced to gather at the Paso Robles depot of plaintiff in error. This crowd is variously estimated by the different witnesses as from 450 to one thousand [Tr. pp. 37, 50, 60, 65, 68, 72, 78], composed largely of soldiers and containing in their midst many officers in uniform. Defendant in error, Captain Ward, was one of these officers. The station grounds about the depot in this town, which is not a large city, were open and unfenced, adjoining public roads and open grounds. Views of the locality appear in the transcript at pages 177 and 182, and also a plat will be found at page 183. A train was due at 10:46 p. m., en route through Paso Robles to Atascadero and beyond, being train number 10, the New Orleans Limited. Another was scheduled

to go through in the same direction at 11:16, being train 20. [Tr. p. 35.] Further than that the crowd had accumulated at the depot and in its vicinity, nothing appears to show its purpose,—whether any or all of the persons present were intending to go back to Atascadero that night, whether some of them would stay over the following day as permitted by the two-day tickets, whether some of them would take the later train due in thirty minutes, or whether some of them were simply at the depot for want of better amusement, and to see the crowd. The evidence is uniform throughout on both sides that the crowd was entirely orderly and gave no indication or sign of disorder until the train was pulling alongside it. [Tr. pp. 46, 55, 58, 61, 64, 82, 99, 101, 163.] As the train pulled in, apparently five or ten minutes late, there was a sudden effort to board it while moving, by the soldiers, and Captain Ward, who had placed himself close to the tracks, was tripped or thrown or fell, so that he went under the trucks, and one of the wheels of one of the chair cars apparently passed over his right leg, necessitating its amputation above the knee. The train had almost stopped when the accident happened [Tr. pp. 115, 155] and was stopped by the train men without knowledge that an accident had happened.

Defendant in error, by his complaint [Tr. p. 5], charged plaintiff in error with liability for this accident, because of alleged negligent failure to prepare to accommodate the crowd, alleged negligent failure to anticipate a general movement and swaying of the crowd to board the train; alleged negligent failure to

employ means to preserve order in the crowd; alleged negligence in running into the station at a rate of about 20 miles per hour, and alleged negligent failure to have the train under instant control. Plaintiff in error denied that the accident was produced by them or any of them, averred that same was caused by a sudden and unwarned movement of other persons, and alleged that defendant in error was himself guilty of contributory negligence. [Tr. p. 21.]

Upon trial by jury, verdict was rendered in favor of defendant in error, in the sum of \$15,500.00 [Tr. p. 27]; upon which judgment was duly entered, on November 16, 1912 [Tr. p. 26], and plaintiff in error has therefrom prosecuted this writ of error. The bill of exceptions appears on pages 29 to 204 of the transcript.

The specifications of error, as assigned, here follow, and thereafter the argument, in which specified errors which seem most prejudicial are discussed, being combined in a small number of separate groups or points.

SPECIFICATION OF ERRORS.

I.

The court erred in overruling the objection of defendant to the question as to how many men there were at the military maneuvers at Atascadero, put to the witness H. B. Light, as set forth in exception No. 1, of the bill of exceptions; for the reason that the same was immaterial and irrelevant.

In this behalf, the following is the full substance of the said question, and the witness' answer thereto:

“Q. About how many men were there, including officers?

A. I should say about ten thousand. In that neighborhood. They consisted of soldiers and officers mostly.”

II.

The court erred in overruling the objection of the defendant to the following statement and answer made by the witness H. B. Light, with reference to a schedule said to have been gotten out by the railroad company for the purpose of showing the camping ground at Atascadero, as set forth in exception No. 2 of said bill of exceptions, for the reason that said statement and answer of said witness were a conclusion, and that the said paper would speak for itself if admitted in evidence.

In this behalf, the following is the full substance of said answer and statement of said witness:

"I have seen this document, marked plaintiff's exhibit 3, before. It is a schedule that was gotten out by the railroad companies at the time, for the purpose of showing the camping grounds."

III.

The court erred in overruling the objection of the defendant to the following statement and answer made by the witness H. B. Light, as to the contents of plaintiff's exhibit 3, and as to copy thereof having been sent to him, as set forth in exception No. 3 of this bill of exceptions; for the reason that the said paper was the best evidence, and that if introduced it would speak for its contents.

In this behalf, the following is the full substance of the said statement and answer of said witness:

"I first saw this paper, plaintiff's exhibit 3, marked on the outside, 'U. S. Army Maneuvers, Camp at Atascadero, near Paso Robles Hot Springs, California, October 10, Southern Pacific,' when five of those were sent to me for Company 'B,' containing a map and a special schedule between Atascadero and Paso Robles, the rate of fare and the nature of the tickets that would be issued during the months of September and October."

IV.

The court erred in overruling the objection of the defendant to plaintiff's exhibit 3, offered in evidence,

the same being a folder advertising Paso Robles Hot Springs, and containing a schedule of trains at Atascadero and Paso Robles, all as set forth in exception No. 4, of the said bill of exceptions; for the reason that the same unnecessarily encumbered the record, and was immaterial and irrelevant.

V.

The court erred in overruling the objection of the defendant to plaintiff's exhibit IV, offered in evidence, being a poster concerning the U. S. army maneuvers at Camp Atascadero, as set forth in exception No. 5 of said bill of exceptions; for the reason that the same was incompetent, irrelevant and immaterial.

VI.

The court erred in overruling the objection of the defendant to the question put to the witness for plaintiff H. B. Light, as set forth in exception No. 6 of said bill of exceptions, with reference to how he, the said witness Light got on the said train at Paso Robles, about twenty-five minutes after the said accident had happened; for the reason that the same was irrelevant and immaterial.

In this behalf, the following is the full substance of said question and the witness' answer thereto:

"How did you get on the train?"

A. Before I got a position, got in a position where I could get on the train, or in the baggage car, or these coaches, the train had started, and I ran—I got to the last, and got the last coach, and I ran along, probably ten or twelve feet before I managed to get on the step after getting hold of the handle. I stood on the step possibly four or five minutes before I had an opportunity to wedge myself on the platform; and the men, of course, being an officer, they pressed aside, and made as much room as they could, and pushed me through by the arms, and got me on my back and tried to pull me in, like you would on a crowded car. I stood on the platform, and it took me maybe probably ten or fifteen minutes to get inside of the car. The condition of the car was packed; there was not room for anybody to

squeeze through from one end of the car to the other. There were men sitting on the sides of the seats, standing between the people that had occupied the train before it arrived at Paso Robles, standing in back of them and in front of them.

VII.

The court erred in denying the motion of defendant to strike out the answer of the said witness H. B. Light, as to how he got on the said train twenty-five minutes or so after the said accident had happened, and as to his difficulties in boarding the same, and as to the condition of the said train and as to the fact that the same was packed and crowded and that there was not room for anybody to squeeze through from one end to the other; all as set forth in exception No. 7 of said bill of exceptions; for the reason that the same was irrelevant and immaterial. In this behalf, the said answer and statement of said witness is as follows:

"Before I got a position, got in a position where I could get on the train, or in the baggage car, or these coaches, the train had started, and I ran—I got to the last, and got the last coach, and ran along probably ten or twelve feet before I managed to get on the step after getting hold of the handle. I stood on that step possibly four or five minutes before I had an opportunity to wedge myself on the platform; and the men, of course, being an officer, they pressed aside and made as much room as they could, and pushed me through by the arms, and got me on my back and tried to pull me in, like you would on a crowded car. I stood on the platform, and it took me maybe probably ten or fifteen minutes to get inside of the car. The condition of the car was packed; there was not room for anybody to squeeze through from one end of the car to the other. There were men sitting on the sides of the seats, standing between the people that had occupied the train before it arrived at Paso Robles, standing in back of them and in front of them."

VIII.

The court erred in overruling the objection of the

defendant to the question as to whether or not the witness William H. Anderson had gone from Atascadero to Paso Robles, on an excursion ticket, as set forth in exception number 8 of said bill of exceptions; for the reason that the same called for a conclusion of the witness, and was incompetent, irrelevant and immaterial.

In this behalf the following is the full substance of said question and the witness' answer thereto:

"Q. You say it was an excursion ticket, was it?

A. Yes, sir."

IX.

The court erred in overruling the objection of the defendant to the question as to what kind of a light the locomotive had that night, put to the witness J. L. Anderson, as set forth in exception No. 9, of said bill of exceptions; for the reason that the same was immaterial and irrelevant.

In this behalf, the following is the full substance of said question, and the witness' answer thereto:

"Q. Do you remember what kind of a light the locomotive had that night?

A. Well, it was not an electric light. It must have been—it was a very bright light, as you will see on any passenger train."

X.

The court erred in overruling the objection of the defendant to the question as to how far the headlights on said engines would throw, so that an engineer could see, put to the witness J. L. Anderson, as set forth in exception No. 10, of said bill of exceptions; for the reason that the same was immaterial and irrelevant.

In this behalf the following is the full substance of said question and the witness' answer thereto:

"Q. Do you know how far these lights will throw so that an engineer can see?

A. A good four hundred yards."

XI.

The court erred in overruling the objection of the defendant to the question as to what was the condition of the platform of the train and the seats thereof after the said accident had occurred, put to the witness H. L. Anderson, as set forth in exception No. 11 of said bill of exceptions; for the reason that the same was immaterial and irrelevant.

In this behalf, the following is the full substance of said question, and the witness' answer thereto:

"Q. What was the condition of the platform, of the train and the seats, etc.?"

A. The train was crowded; I went through about three cars, and they were all in the same crowded condition."

XII.

The court erred in overruling the objection of the defendant to the question as to the speed at which the said train came in, put to the witness Elijah H. Griffin, as set forth in exception No. 12, of said bill of exceptions; for the reason that no foundation had been laid for the said witness to give an answer thereto.

In this behalf, the following is the full substance of said question and the witness' answer thereto:

"Q. In your judgment, at what speed did the train come in?"

A. I don't know just exactly how fast the train came in, but I know it was coming in fast. It came in faster than you generally see a train coming into a station. I have seen several trains come into stations, and I don't believe I ever saw one come into a station as fast as that one came in."

XIII.

The court erred in overruling the objection of the defendant to the question as to what was the condition of the second day coach after the accident had already happened, as put to the witness Samuel Young, as set forth in exception No. 13 of said bill of exceptions; for the reason that the same was immaterial.

In this behalf, the following is the full substance of said question, and the witness' answer thereto:

"Q. What was the condition of that coach?

A. The first coach was crowded so I could see from where I was standing there was no use trying to get on that; and when I tried to get on the second coach it was crowded, and I just did get in, and I stood up all the way to Atascadero."

XIV.

The court erred in overruling the objection of the defendant to the question as to whether or not there was any man representing the Southern Pacific Company or any agent attempting in any way to guide or direct the crowd about boarding the train, put to the witness Samuel Young, as set forth in exception No. 14, of said bill of exceptions; for the reason that the same was immaterial and irrelevant, and that it appeared from the plaintiff's own proof that there was not any disorder or anything calling upon the Southern Pacific Company to restrain or control a crowd that did not need any control or restraint.

In this behalf the following is the full substance of said question, and the witness' answer thereto:

"Q. Was there any man representing the Southern Pacific Company, or any agent out there, attempting in any way to guide or direct that crowd about boarding the train?

A. There was no one that I could see at all."

XV.

The court erred in overruling the objection of defendant to the question as to whether the witness heard anyone say anything to the crowd about boarding that train, put to the witness Samuel Young, as set forth in exception No. 15 of said bill of exceptions; for the reason that the same was immaterial and irrelevant, and that it appeared from the plaintiff's own proof that there was not any disorder, or anything calling upon the Southern Pacific to restrain or control a crowd that did not need any control or restraint.

In this behalf, the following is the full substance of said question, and the witness' answer thereto:

"Q. Did you hear anyone say anything to the crowd about boarding that train? A. No, sir."

XVI.

The court erred in overruling the objection of defendant to the question as to whether or not the witness was in a position to see any accession to the crowd about the time the train came in, put to the witness Henry D. Thomason, as set forth in exception No. 16 of said bill of exceptions; for the reason that the same called for the conclusion of the witness and invaded the province of the jury.

In this behalf, the following is the full substance of the said question, and the witness' answer thereto:

"Q. State whether or not you were in a position to see any accession to the crowd about the time the train came in, in the position in which you and Captain Ward stood.

"A. I could see if there was a large accession. I don't suppose I could have told whether a few men joined the crowd, but any large accession, I could have seen. There was no large accession, as the train came in."

XVII.

The court erred in overruling the objection of the defendant to the question put to the witness Henry D. Thomason as set forth in exception No. 17 of said bill of exceptions, in which he was asked why he said that the speed of the train was in the neighborhood of twenty or twenty-five miles an hour; for the reason that an answer to such question was incompetent, irrelevant and immaterial, and called for a comment of the witness upon the value of his own testimony.

In this behalf, the following is the full substance of said question and the witness' answer thereto:

"Q. Why do you say that?

A. I have boarded a good many trains under all circumstances and in a good many stations throughout the United States. I can say that riding in an auto-

mobile, I think I know about what twenty or twenty-five miles an hour speed is."

XVIII.

The court erred in overruling the objection of the defendant to the question as to whether or not the witness saw any agent, station agent, or representative or persons pretending to represent the railroad, or anybody else, at said station, who attempted in any way to regulate said crowd or its admission to that train, that night, put to the witness Henry D. Thomason, as set forth in exception No. 18 of said bill of exceptions; for the reason that the same was incompetent, irrelevant and immaterial.

In this behalf, the following is the full substance of said question and the witness' answer thereto:

"Q. Captain, did you see any agent, station agent or representative or persons pretending to represent the railroad or anybody else there, who attempted in any way to regulate the crowd or its admission to the train that night? A. I did not."

XIX.

The court erred in overruling the objection of defendant to the question as to whether the witness heard any statement made by any agent or any person in behalf of the Southern Pacific Company or anybody in reference to the admission of that crowd, or of the manner in which they should take the train, put to the witness Henry D. Thomason, as set forth in exception No. 19 of said bill of exceptions; for the reason that the same was incompetent and irrelevant and immaterial.

In this behalf, the following is the full substance of said question, and the witness' answer thereto:

"Q. Did you hear any statement made by any agent or any person in behalf of the Southern Pacific, or anybody, with reference to the admission of that crowd, or of the manner in which they should take the train? A. I did not."

XX.

The court erred in overruling the objection of defendant to the question as to how many actual engagements of war the said plaintiff John Wilbur Ward had experienced, which question was put to the witness John Wilbur Ward, as set forth in exception No. 20 of said bill of exceptions; for the reason that the same was immaterial and irrelevant.

In this behalf, the following is the full substance of said question and the witness' answer thereto:

"Q. State just generally without any details through how many actual engagements of war you have passed.

A. Fifty-seven."

XXI.

The court erred in overruling the objection of the defendant to the question as to what were the duties of the plaintiff with reference to Post Exchange, put to the plaintiff, John Wilbur Ward, as a witness in his own behalf, as set forth in exception No. 21 of said bill of exceptions; for the reason that the same was immaterial and irrelevant.

In this behalf, the following is the full substance of said question and the witness' answer thereto:

"Q. What were your duties with reference to the Post Exchange?

A. The Post Exchange was a general store; sold nearly everything. I had entire charge and control of it, under the laws laid down by Congress and the Secretary of War, especially in regard to buying and directing the selling and receiving the funds which were brought in; and also the Post Exchange Council, of which I acted as secretary, and the Post Exchange Council consisted of all the company commanders in camp, approved by the colonel."

XXII.

The court erred in overruling the objection of defendant to the question as to whether or not there was an agent of the Southern Pacific at Atascadero on the 8th day of October, or prior to that time, during Oc-

tober or September, apart from the regular agent of the Southern Pacific Company, put to the plaintiff John Wilbur Ward, as a witness in his own behalf, as set forth in exception No. 22 of said bill of exceptions; for the reason that the same is immaterial and irrelevant.

In this behalf, the following is the full substance of the said question, and the witness' answer thereto:

"Q. Captain, do you know whether or not there was an agent of the Southern Pacific at Atascadero on the 8th day of October and prior to that time, during October and September, apart from the regular agent of the Southern Pacific Company?

A. There were two agents there during the encampment."

XXIII.

The court erred in overruling the objection of the defendant to the question put to the plaintiff John Wilbur Ward, as a witness in his own behalf, as to whether he knew the number of trains that ran from Atascadero into Paso Robles, on October 8th, 1910, the same having been put to said witness as set forth in exception No. 23 of said bill of exceptions; for the reason that the same was immaterial and irrelevant.

In this behalf, the following is the full substance of said question and the witness' answer thereto:

"Q. Do you know the number of trains that ran from Atascadero into Paso Robles that day?

A. There were six passenger trains ran in the daylight hours between Atascadero and Paso Robles. Three of them were specials."

XXIV.

The court erred in overruling the objection of the defendant to the question as to the number of trains that ran from Paso Robles to Atascadero on the 8th day of October, put to the plaintiff John Wilbur Ward, as a witness in his own behalf, as set forth in exception number 24 of said bill of exceptions; for the reason that the same was immaterial and irrelevant.

In this behalf, the following is the full substance of the said question and the witness' answer thereto:

“Q. Do you know the number of trains that ran from Paso Robles to Atascadero that 8th day of October?”

A. I do not, except that I know that only one train went south after the special had taken the crowd up for the swimming event up to Paso Robles. That was the Sunset Limited, due at 10:45.”

XXV.

The court erred in denying the motion of defendant to strike out the answer and statement of the said plaintiff, John Wilbur Ward, as a witness in his own behalf, as set forth in exception No. 25 of said bill of exceptions; for the reason that the same was purely negative testimony, and incompetent and irrelevant.

In this behalf, the following is the full substance of the said statement of said witness:

“I do not, except that I know that only one train went south after the special had taken the crowd up for this swimming event up to Paso Robles. That was the Sunset Limited, due at 10:45.”

XXVI.

The court erred in overruling the objection of defendant to the question put to the plaintiff, John Wilbur Ward, as a witness in his own behalf, as set forth in exception No. 26, of said bill of exceptions, with reference to whether or not he knew that the soldiers and officers of the United States army and the national guard at Paso Robles had bought a certain kind of ticket; for the reason that the same is immaterial and irrelevant.

In this behalf, the following is the full substance of said question and the witness' answer thereto:

“Q. Do you know whether or not the soldiers and officers of the United States army and the national guard who were at Paso Robles that day bought this same kind of a ticket—return?”

A. I know that a very large portion of them did.”

XXVII.

The court erred in overruling the objection of the defendant to the question as to whether or not there was a swimming contest at Paso Robles on the evening of October 8th, 1910, put to the plaintiff, John Wilbur Ward, as a witness, in his own behalf, as set forth in exception No. 27, of said bill of exceptions; for the reason that the same was immaterial and irrelevant.

In this behalf, the following is the full substance of the said question and the witness' answer thereto:

"Q. I will ask you if you know whether or not there was a swimming event at Paso Robles on the evening of October 8th, 1910? A. Yes."

XXVIII.

The court erred in overruling the objection of defendant to the question put to John Wilbur Ward, plaintiff, as a witness in his own behalf, as to whether he heard anyone give any warning or any direction as to the manner in which the crowd should take the train, as set forth in exception No. 28 of said bill of exceptions; for the reason that the same is immaterial, incompetent and irrelevant.

In this behalf the following is the full substance of said question, and the witness' answer thereto:

"Q. Did you hear anyone give any warning or any direction as to the manner in which the crowd should take that train? A. No."

XXIX.

The court erred in overruling the objection of defendant to the question put to John Wilbur Ward, plaintiff, as a witness in his own behalf, as to whether he saw any agent at the station or on the station premises that night, as set forth in exception No. 29, of the bill of exceptions; for the reason that the same was immaterial and irrelevant.

In this behalf, the following is the full substance of said question, and the witness' answer thereto:

"Q. Did you see any agent at the station or in the station premises that night?

A. I caught a glimpse of a man selling tickets, the only one there."

XXX.

The court erred in overruling the objection of defendant and in permitting the plaintiff, John Wilbur Ward, as a witness in his own behalf, to remove his trousers and exhibit to the jury the stump of his amputated leg, as set forth in exception No. 30 of said bill of exceptions; the same being incompetent, and immaterial, and constituting a dramatic exhibition, improper in a jury trial, not susceptible of cross-examination, and not throwing any light upon said case, and being merely for dramatic effect.

XXXI.

The court erred in overruling the objection of defendant to the question put to John Wilbur Ward, plaintiff, witness in his own behalf, as set forth in exception No. 31 of said bill of exceptions, as to whether or not the injury in question had affected his standing in the army; for the reason that the same was immaterial and irrelevant.

In this behalf, the following is the full substance of the said question and the witness' answer thereto:

"Q. I will ask you whether or not this injury affected your standing in the army. A. Yes. Closed my career in the army."

XXXII.

The court erred in overruling the objection of defendant to the introduction of the American tables of mortality, as set forth in exception No. 32 of said bill of exceptions, for the reason that the same was irrelevant and immaterial.

XXXIII.

The court erred in overruling the objection of defendant to the question put to John Wilbur Ward, plaintiff, as a witness in his own behalf, as set forth in exception No. 33 of said bill of exceptions, as to the

age at which officers of the United States army are retired; for the reason that the same was purely speculative.

In this behalf, the following is the full substance of said question, and the witness' answer thereto:

"Q. Captain, do you know the age at which officers of the United States army are retired? A. It is under an Act of Congress. At sixty-four years of age. I was receiving a salary of \$2,400.00 per year, besides allowances, and etc."

XXXIV.

The court erred in overruling the objection of defendant to the question put to John Wilbur Ward, plaintiff, as a witness in his own behalf, as to the order of promotion that he would have been permitted to enjoy, if he had remained in the army; for the reason that the same enters the realm of speculation and conjecture and was incompetent. The same being set forth in exception No. 34 of said bill of exceptions.

In this behalf, the following is the full substance of the said question, and the witness' answer thereto:

"Q. Captain, just state to the jury the order of promotion that you would have been permitted to enjoy had you remained in the army.

A. The promotions in the army are made by Act of Congress and at a certain time."

XXXV.

The court erred in overruling the objection of defendant to the question put to John Wilbur Ward, plaintiff, as a witness in his own behalf, as to what was the order of promotion in the army that he would have been permitted to enjoy had he remained therein, as set forth in exception No. 35 of the said bill of exceptions; for the reason that the same was not the best evidence.

In this behalf the following is the full substance of said question, and the witness' answer thereto:

"Q. Just state what it is; the fact, that is what I am calling for.

A. The promotion of second and first lieutenant and captain, major, lieutenant-colonel, colonel, are all

by law. From the colonels, the generals are selected, and with each promotion there is an increase of pay; also with the years of service; there is a ten per cent increase of pay with every five years of service up to twenty years. There is an allowance in money, when an officer is not living in a military post and furnished a house. According to the different ranks, he gets a certain money allowance. That is all by law. And he gets his fuel, light bills paid, but that is not commuted in money; and there are several privileges, but no other ones commuted and paid in actual money."

XXXVI.

The court erred in overruling the objection of defendant to the question put to John Wilbur Ward, plaintiff, as a witness in his own behalf, as to a computation based upon the statement that he had given of the amount of money he would have earned by a fixed rule of promotion to the age of sixty-four, as set forth in exception No. 36 of said bill of exceptions; for the reason that the same was incompetent, irrelevant and immaterial and invading the province of the jury.

In this behalf, the following is the full substance of the said question and the witness' answer thereto:

"Q. Have you made a computation based upon the statements which you have just given of the amount of money you would have earned by the fixed rule of promotion to the age of sixty-four when you would have been retired? A. I made the computation in my rank as captain and it amounted to \$106,000.00 up to the date of sixty-four years of age."

XXXVII.

The court erred in overruling the motion of the defendant for a judgment of non-suit, made at the close of the plaintiff's case, as set forth in exception No. 37 of said bill of exceptions; the same being made on the ground that there was no proof establishing or tending to establish any negligence on the part of the defendant company; on the further ground that there was proof establishing or tending to establish any negligence on the part of the company defendant, which

directly or proximately contributed to or resulted in the injury to the said plaintiff; on the further ground that the proof affirmatively established that the injury sustained by the plaintiff was directly and proximately caused by the act of some third person, over whom the defendant had no control; and on the further ground that the proof affirmatively established that plaintiff himself failed to exercise ordinary care or caution for his own safety, and thereby directly and proximately contributed to the happening of the accident.

XXXVIII.

The court erred in refusing to instruct the jury, as requested by defendant's requested instruction numbered I, as set forth in exception number 39 of said bill of exceptions, as follows, to-wit:

"You are instructed in this action to return your verdict in favor of defendant."

XXXIX.

The court erred in refusing to instruct the jury, as requested by defendant's requested instruction numbered XX, as set forth in exception number 40 of said bill of exceptions, as follows:

"The degree of care owed by a railroad company to those upon a station platform, who may intend to become passengers on a train, is not the same degree of care which the railroad company owes to those who are upon the train or in transit.

The degree of care owed to those upon a station platform is a reasonable degree of care, and not that which the law characterizes as the highest degree of care or foresight."

XL.

The court erred in giving to the jury instruction E, set forth in the bill of exceptions, to which the said defendant duly excepted, the same being entirely immaterial to said cause and improper, as leading the jury to a consideration of whether or not the defendant was negligent, in respect to some matter having no proxi-

mate bearing upon the happening of the said accident; the said instruction being as follows, to-wit:

"You are instructed that every railroad corporation must start and run its cars for the transportation of persons at such regular times as it shall fix by public notice, and must furnish sufficient accommodation for the transportation of all such passengers as within a reasonable time previous thereto offer for transportation at stopping places established for receiving and discharging way passengers; and must transport such passengers at, from and to such places on the due payment of fare therefor."

XL I.

The court erred in giving to the jury instruction F, set forth in the bill of exceptions, to which the said defendant duly excepted, the same being entirely immaterial to said cause and improper, as leading the jury to a consideration of whether or not the defendant was negligent, in respect to some matter having no proximate bearing upon the happening of the said accident; the said instruction being as follows, to-wit:

"You are also instructed that a carrier of persons for reward is bound to provide vehicles safe and fit for the purposes to which they are put; that such carrier of persons must not overcrowd or overload his vehicle; that such carrier of persons must provide everything necessary for their safe carriage, and must exercise to that end a reasonable degree of skill."

XL II.

The court erred in giving to the jury instruction G, set forth in the bill of exceptions, to which the said defendant duly excepted, the same being entirely immaterial to said cause and improper, as leading the jury to a consideration of whether or not the defendant was negligent, in respect to some matter having no proximate bearing upon the happening of the said accident; the said instruction being as follows, to-wit:

"You are further instructed that every railroad corporation must furnish, on the inside of its passenger cars, sufficient room and accommodation for all passen-

gers to whom tickets are sold for any one trip and for all persons presenting tickets entitling them to travel thereon.”

XLIII.

The court erred in giving to the jury instruction H, set forth in the bill of exceptions, to which the said defendant duly excepted, the same being entirely immaterial to said cause and improper, as leading the jury to a consideration of whether or not the defendant was negligent, in respect to some matter having no proximate bearing upon the happening of the said accident; the said instruction being as follows, to-wit:

“You are further instructed that a common carrier of persons for reward must provide a sufficient number of vehicles to accommodate all the passengers who can be reasonably expected to require carriage at any one time, and that such common carrier of persons must provide every passenger with a seat.”

XLIV.

The court erred in giving to the jury instruction M, set forth in the bill of exceptions, to which the said defendant duly excepted, the same being entirely immaterial to said cause, and improper, as leading the jury to a consideration of whether or not the defendant was negligent, in respect to some matter having no proximate bearing upon the happening of the said accident; the said instruction being as follows, to-wit:

“I also instruct you that it is the duty of every public carrier of passengers to employ sufficient servants for the protection of such passengers, and it is under obligations to take due care to secure the safety of a passenger who is upon its premises peaceable for the purpose of boarding its trains.”

XLV.

The court erred in giving to the jury instruction N, set forth in the bill of exceptions, to which the said defendant duly excepted, the same being entirely immaterial to said cause, and improper, as leading the jury to a consideration of whether or not the defendant

was negligent, in respect to some matter having no proximate bearing upon the happening of the said accident; the said instruction being as follows, to-wit:

“You are further instructed that if it is shown that two parties have contributed to the injury of a third person, then notwithstanding the act of one of such two parties may have been reckless and that of the other simply manifesting the want of ordinary care, neither of such parties is relieved of liability for an injury to such third person who was not himself guilty of contributory negligence.”

ARGUMENT.

The case at bar is one where the railroad has been held liable for the injury of an intending passenger. The act which immediately produced the injury was confessedly that of other persons than the defendant. In the trial of the case evidence was admitted to the effect that the train, after Captain Ward was injured and after the soldiers had boarded it,—long after the accident,—was found to be crowded. This fact was presented to the jury by the charge of the court as a violation by defendant of its duty and as an item of negligence. Error in the admission of this evidence and in the instructions in reference thereto, concerning matters which could have no casual connection with the injury, is hereinafter discussed under POINT II. Error in the admission of other evidence and instructions thereof, as to the absence of any railroad officers controlling or directing the crowd is discussed under POINT III. Error in the admission of certain other evidence is discussed under POINTS IV, V and VI. Error in the giving of an instruction as to negligence, not limiting the same to negligence proximately caus-

ing the accident, is discussed under POINT VII. But generally under POINT I is presented the proposition of the insufficiency of the evidence to justify submission of the case to the jury.

POINT I.

THE COURT ERRED IN DENYING THE MOTION OF PLAINTIFF IN ERROR FOR NON-SUIT (Specification XXXVII, Exception 37) and IN REFUSING TO GIVE TO THE JURY A DIRECTION TO RETURN A VERDICT FOR THE DEFENDANT (Specification I, Exception 39).

In the case at bar we contend that the evidence was insufficient to justify the submission of the matter to the jury. Plaintiff was injured by the act of others. The railroad company had no warning of that act. The crowd at the depot had only been a short time gathering and no disposition to disorder had been manifested. The railroad company had no notice that any large number of people would desire to take this particular train. No necessity for control of the crowd was reasonably or at all apparent. The crowd was not confined on a platform or in a restricted space. It was not composed of helpless women or children, but of soldiers. Officers were present and saw no need of action.

The case is not of the same type as *Taylor v. Penn. Co.*, 50 Federal 755, or *Penn. R. Co. v. Stockton*, 184 Fed. 422, wherein passengers sustained injury by the pressure of crowds. In the *Stockton* case, it will be noted that the crowd was on a platform, that before the train came in "everybody was pushing," and that the

crowd at the time of the accident, in that case, was not an unusual one, for the season and place, but that the situation was the ordinary situation which the railroad company had been accustomed to find there. In the Taylor case, the facts were that the crowd was admitted into a confined space, in the company's depot in Pittsburgh, where the company had ready facilities to have met the emergency thus created by them by admitting a dense crowd into a restricted place. In both these cases, the crowds were apparently mixed,—men, women and children—the ordinary excursion crowd. In the case at bar those present were mostly soldiers with their officers, many of them in uniform. These men were capable of control by their own officers, and not likely to take kindly to interference by police. The railroad company had a right, it seems to us, to expect them to be orderly and to refrain from violent, reckless conduct, as such was the promise of their behavior.

The duty of the company depends upon the reasonable necessities of the situation. It varies according to the circumstances, the kind of crowd, the kind of place, and all other conditions. As said by the Supreme Court of Massachusetts in *Glennen v. Boston Elevated Railroad Company*, 93 *Northeastern* 700:

“The precautions which the carrier must take in the performance of this duty depend upon the facts of each case. No positive regulation or absolute usage has been or can be defined as a final standard for the discharge of its obligation. The natural turbulence of a multitude of people to be expected at a public celebration may require provision against unusual occurrences. The kind of assembly and character of people likely to attend

it, the place from which they have come and to which they are going, the hour of the day and the normally accompanying impatience of restraint, the probable temper and disposition of a crowd in view of the causes which bring it together are all circumstances to be regarded in determining whether in any instance the carrier has performed the highly onerous and stringent obligation imposed on it. * * * On the other hand, a common carrier does not insure to its passengers immunity from harm. It is engaged in a public service which must be managed in such a manner as to be practical and adapted to the needs of contemporary society, both as to expense, convenience, comfort, and rapidity. Hence it cannot be held responsible for manifestations of lawlessness, heedlessness, impetuosity or force which a high degree of prevision and sagacity *could not reasonably be expected to forestall*. Injury arising from the sporadic act of an individual or the aggregated impulses of a throng, if outside the limits of conduct reasonably to be apprehended by one under a strong legal duty to be most keenly sensitive to guard against preventible wrongs, affords no ground of liability. The carrier is not bound to adopt all possible precautions nor every conceivable safeguard for the safety of passengers, nor to exercise the utmost diligence which human ingenuity can imagine to avert injury. *Simmons v. New Bedford Vineyard & Nantucket Steamboat Co.*, 97 Mass. 361, 93 Am. Dec. 99; *Joy v. Winnisimmet Co.*, 114 Mass. 63; *O'Neil v. Lynn & Boston St. Ry. Co.*, 180 Mass. 576, 62 N. E. 983; *Pitcher v. Old Colony St. Ry.*, 196 Mass. 69, 81 N. E. 876, 13 L. R. A. (N. S.) 481, 124 Am. St. Rep. 513; *Lyons v. Boston Elevated Ry.*, 204 Mass. 227, 90 N. E. 419; *McCumber v. Boston Elevated Ry.*, 93 N. E. 698. These principles are well settled and have been steadily adhered to."

As suggested, the case at bar is not one where the company became fairly charged with knowledge that a

large number of people would seek this particular train or that they would reverse their conduct and become suddenly violent and disorderly. The case is similar to the one decided in *Pittsburg R. Co. v. Hinds* (Penn.), 91 American Decisions 224 (53 Penn. 512), wherein it is said:

“The case shows that an agricultural fair was in progress in the vicinity of Beaver Station; that an excited crowd assembled at the station, rushed upon the cars in such numbers as to defy the resisting power at the disposal of the conductor, and that the man who commenced the fight sprang upon the platform of the hindmost car after they were in motion.

“Of what consequence, then, was the fact that the conductor knew these were improper passengers? * * * But the case is that of a mob rushing with such violence and in such numbers upon the cars as to overwhelm the conductor as well as the passengers.

“It is not the duty of railroad companies to furnish their trains with a police force adequate to such emergencies. They are bound to furnish men enough for the ordinary demands of transportation, but they are not bound to anticipate or provide for such an unusual occurrence as that under consideration.”

The entire record demonstrates that the action of the soldiers was not reasonably to be apprehended under the circumstances, that no sign of it was given in advance and that the injury to Captain Ward was so sudden and unexpected as to be unpreventable.

“In an action for injuries to a passenger from the violence of a fellow passenger, an instruction that, if the injury complained of was so unexpected that defendant’s employes could not have

seen and prevented it by the highest degree of care, plaintiff could not recover, was proper.”

Anderson v. South Carolina & G. R. Co., 58
S. E. p. 149, syllabus 1.

“In the light of authority, and in the very reason of things, the liability or non-liability of the carrier of passengers, in cases of this nature, must be held to depend upon the presence or absence of evidence tending to show the employes of the defendant carrier either knew, or by the exercise of due care should have known, from the circumstances of the particular case, injury to the passenger was threatened or impending, which injury, by the exercise of that high degree of care which the law requires of a carrier of passengers for the safety and protection of the passenger, might not only have been foreseen, but guarded against, thus averting the injury.”

Brown v. Chicago R. I. & P. Ry. Co., 139 Fed.
Reporter, p. 975.

See also:

Cannon v. Midland, L. R. Vol. 6, Ireland, 205.

The consideration of the court is invited to the further fact that in the Taylor and Stockton cases, *supra*, the railroad company had notice of the presence of the crowd and its condition. It does not appear that in the case at bar, the railroad company had any notice that the soldiers would accumulate at the depot at Paso Robles, that night, just prior to the arrival of No. 10, or that they would, in any considerable numbers, seek to board train No. 10, which was the New Orleans Limited, carrying two baggage cars and smoker, day car, two or three chair cars and about three Pullmans—ten or eleven cars in all. While the company would

honor the tickets it issued between Paso Robles and Atascadero upon this train, it had furnished a special schedule showing other trains especially placed for this service. One of them was scheduled to come through thirty minutes later. [See Tr. p. 35.] What may have caused a large portion of the soldiers suddenly to determine to go back to Atascadero that night and on that particular train, instead of taking the next train or staying over until the next day, cannot be told. Certainly the railroad company did not know of it, except by the gradual aggregation of an unusual crowd at the depot, which began about thirty minutes before train time. There was, of course, no apparent need of policing these groups of soldiers at any time while they were waiting quietly along the open grounds adjoining the depot. They were not confined to a platform adjacent to the tracks; they were nowhere so packed or confined that anyone in the crowd might not easily withdraw a few feet and be entirely outside the crowd. There is some evidence that down near the depot itself, the crowd was thickest, but northward from the depot, 75 or 100 feet or perhaps more, where Captain Ward was, the crowd was broken and scattered and not dense.

“I said the crowd from where I was to the south, as far as I could see, was very thick. I could readily see up to the front of the waiting room, because there was a certain amount of light shining out of the doors or windows, or something down there. Beyond that point where the light was, I couldn’t see any part of it. I was where the crowd thinned out. To the south of me they were standing packed, you may say; they were not packed to the north of me; south, in the front or rear.”

[Tr. p. 99, testimony of Capt. Ward, plaintiff.]

The makeup of the crowd was almost entirely men, principally soldiers, and various officers were among them. Nobody anticipated any trouble and there was no trouble. There is no evidence that any such crowd had ever before accumulated or sought to take this train. The thing unexpected by all, unwarned, unforeseen by anyone, happened—some of the men suddenly broke the bonds of restraint and tried to board the moving train, running over one of their own officers in so doing. Instantly, Captain Ward was injured. There was no intervening time in which, if a thousand policemen had been present, the result could have been intercepted.

As described by Lieutenant Anderson:

“Just as the train was moving in there, a bunch of soldiers come running from back of me. There was a park, I believe, back in there somewhere, within a block at least, and some of them may have been in there. All that I can say is that there were men came from the rear of me and joined the crowd. They might have been anywhere. At least, there were men standing directly in the rear of me, a few men, and they moved up past me. It looked to me like there was about a crowd of about a hundred persons joined the crowd; plunged right in the rear of these others, so that the density of the crowd was then brought up to me.” [Tr. p. 57.]

There was some controversy in the trial as to whether the train of defendant came into the station grounds at a high or low rate of speed. Plaintiff, seeking to prove that the speed was high, claimed that that was negligence bearing upon the accident. How this could have any effect on the happening of the accident is beyond

our understanding. The effort of the crowd to board a train as it is moving, would be probably more induced by slow speed than by high speed. The defendant was under the necessity of bringing its train into the vicinity of the depot,—and it is apparent that the rate of speed, whether great or small, was not a producing cause of the accident. The slower the train might have run, the more men apparently would attempt to board it while it was moving. Captain Ward was tripped and thrown and injured in an instant, and the train stopped, by the great preponderance of the evidence, immediately thereafter, though the trainmen did not know that he had been hurt. The stop was not made as an emergency stop, because of knowledge of the accident.

We submit, therefore, that the defendant has been convicted in this case upon insufficient evidence; that the situation at Paso Robles station, an open, unconfined space, a quiet crowd of soldiers, a small city where all those at the depot are not always intending to become passengers, a train engaged in overland service, and not supposed to be equipped for an excursion crowd and scheduled to be followed in thirty minutes by a train specially for this service—all of these things seem to us to make this a case peculiar to itself and one in which it cannot fairly be said that the railroad company was required to foresee the accumulation of the crowd or the sudden act by which the crowd caused Captain Ward to be injured.

POINT II.

THE COURT ERRED IN THE ADMISSION OF EVIDENCE AS TO—

(a) The crowded condition of said train after the accident. [See specifications XI and XIII, exceptions 11 and 13.]

(b) The difficulties of witness H. B. Light in boarding the train twenty-five minutes after the accident happened. [Specifications VI and VII, exceptions 6 and 7.]

THE COURT ERRED IN GIVING TO THE JURY, INSTRUCTIONS E. F. G AND H [Tr. pp. 188-189] AS FOLLOWS:

E.

“You are instructed that every railroad corporation must start and run its cars, for the transportation of persons at such regular times as it shall fix by public notice, and must furnish sufficient accommodation for the transportation of all such passengers, as within a reasonable time previous thereto, offer for transportation at stopping places established for receiving and discharging way passengers; and must transport such passengers at, from, and to such places on the due payment of fare therefor.”

F.

“You are also instructed that a carrier of persons for reward is bound to provide vehicles safe and fit for the purposes to which they are put; that such carrier of persons must not overcrowd or overload his vehicle; that such carrier of persons must provide everything necessary for their safe carriage, and must exercise to that end a reasonable degree of skill.”

G.

“You are further instructed that every railroad corporation must furnish, on the inside of its passenger cars, sufficient room and accommodation for all pas-

sengers to whom tickets are sold for any one trip and for all persons presenting tickets entitling them to travel thereon.”

H.

“You are further instructed that a common carrier of persons for reward must provide a sufficient number of vehicles to accommodate all the passengers who can be reasonably expected to require carriage at any one time, and that such common carrier of persons must provide every passenger with a seat.”

The two propositions set forth in this heading, as to admission of evidence and as to instructions to the jury based thereon, may, we believe, properly be discussed together. The court, over objection, admitted evidence on behalf of plaintiff as to the crowded condition of the cars of this train after the accident had happened; also as to the difficulties of H. B. Light, a witness for the plaintiff, in making a boarding of the train, twenty-five minutes after the accident had happened. The evidence of H. B. Light on this subject is to be found on pages 42 and 43 of the transcript, and presented to the jury his own efforts to board the train, long after this accident was over, when it had become heavily crowded and jammed with people. This evidence was admitted to the jury, accompanied by the instructions of the court above quoted, describing such a condition as a violation of its duty by the common carrier.

By these instructions the court exhibited the defendant to the jury as a violator of its statutory and common law duties. Error was committed in our opinion, by submitting to the jury questions of negligence based on the subsequent condition of the train, and long after

the accident had happened. Of course it is apparent that, according to Captain Light's testimony, the train was heavily crowded when he tried to board it about 25 minutes after the accident. This over-crowding was doubtless a violation of the law, but how or in what manner it could be a proximate or even a remote producing cause of an accident which had long before happened, is beyond our understanding. We firmly believe that it was error to place the defendant before the jury as a violator of law, upon evidence or instructions relating to specific conditions, having no relation of cause or effect to the accident.

The instructions E, F, G and H, above quoted, certainly submitted to the jury in this case, negligence or negligent acts or things of defendant which could have no legitimate bearing on the accident. The evidence introduced as to the crowded condition in which the train was found after the accident was over, could throw no light on the situation at the time the train was pulling in. The crowd on the station grounds could not, in the nature of things, know as the train was approaching at night, whether it was crowded or empty; their action in surging or in standing still would be the same, whether the train was full or not, for the action of the crowd could not be based on any knowledge of what the conditions were inside the train. The effort to board the train would have been just the same, regardless of whether it was crowded or not. The condition of the train could not be a producing cause of this accident, for there is no causal connection between its crowded condition (if it was crowded before the acci-

dent) and the effort of the crowd to board it before they could know anything about whether it was crowded or not. Their act was caused by their own members, rather than by any knowledge of sufficient or insufficient accommodations, on board the train, and assuming that there were five or six hundred people on the station grounds, some unknown portion of them desiring to board this train, in what manner could its condition after being boarded by a large crowd and long after the accident happened (negligent though that condition may have been, or in violation of the law against overcrowding cars) have been material? The defendant is liable in this action only for negligence which has a causal connection with the accident. To admit evidence of other negligences subsequent to the accident and then to instruct upon the same as breaches of the law, is clearly erroneous.

“While a violation of penal statutes may constitute negligence *per se*, actionable negligence will not arise therefrom, unless the violation of the statute is the proximate cause of the injury.”

Head-note, *Steel Car Forge Co. v. Chec*, 184 Federal 868.

In this case, it is further stated:

“The trial judge in charging the jury, said:

“ ‘Coming back to the first theory of the plaintiff, the law which I referred to prohibiting the employment of a person under 16 years of age in the occupation named, which first of occupations includes one in which this plaintiff was engaged at the time of this accident, that law provides that a person shall not be employed under 16 years of age during vacation if he cannot read and write

simple sentences in the English language, and is not blind.

“ ‘If you find in this case that this plaintiff was under 16 years of age at the time of this injury, that he could not read and write simple sentences in the English language at that time, and was not blind, then the charge of negligence against the defendant on this first theory—under this first theory is sustained.’

“Under this instruction the jury were authorized, if not directed, to find the defendant guilty upon the mere showing of a violation of the statute, without any proof of actual negligence; that the violation of the statute was in itself negligence, and sufficient to form the basis of a recovery.

“Causal connection between the negligence charged and the injury complained of always must be shown, and, while a violation of certain penal statutes constitutes negligence *per se*, nevertheless to make such negligence actionable it must be the proximate cause of the injury for which the action is brought. The violation of the statute which imposes a duty may support a cause of action for damages to one who is affected by its observance, provided it is shown that the injury was the direct or necessary result of the breach. * * * There was no relation of cause and effect between the omission on the part of the plaintiff in error to observe the provisions of this statute, and infliction of the injury upon the defendant in error in this case. In no way can it be said that the failure to observe the statutory requirements had a tendency to bring about the accident complained of.”

In the case of *Schwartz v. Cal. G. & E. Co.*, decided August 3, 1912, 44 Cal. Decisions 164, it is said:

“The rule is well settled that ‘an injury is not actionable which would not have resulted from the act of negligence, except for the interposition of an independent cause.’ (*Chicago etc. Ry. Co. v. Elliott*, 55 Fed. 949; *Cole v. German Savings and*

Loan Society, 124 Federal 115; Western Union Tel. Co. v. Schriver, 141 Fed. 550.)

"In the Cole case, *supra*, it appears that the plaintiff entered and passed along a hall in the building of the defendant to take the elevator, the well or shaft of which opened into the hall. A boy, who was a stranger to her and to the defendant, hurried past her in the hall, pushed the sliding door of the well of the elevator, which was open from one to ten inches, back as far as it would go and stepped back. The plaintiff supposed the boy was the operator of the elevator, and stepped in. The elevator was at an upper floor in charge of its regular operator, and plaintiff fell to the bottom of the well and was injured. The hall was so dark that it was difficult, but not impossible, to see the elevator when it was at the lower floor, and when it was not there nothing but darkness was visible in the well. It was held that the negligence acts and omissions of the defendant were not and those of the strange boy were, the proximate cause of the injury. The latter constituted an independent intervening cause which interrupted the natural sequence of events between the negligence of the defendant and the injury of the plaintiff, insulated the defendant's negligence from the plaintiff's hurt, broke the causal connection between them and produced the injury. The negligence of the defendant in that case, stated by the court, consisted of permitting such a degree of darkness in the hall, of allowing boys to ride upon and sometimes operate the elevator, or neglecting to provide a lock for the door which would prevent anyone from unlocking it from the outside and of permitting the door to stand open from one to ten inches. Defendant there was indeed guilty of gross negligence, but it was held not to be the proximate cause of the injury."

It cannot be said that the empty or crowded condition of the train moving into a station has any effect on the

movement of the crowd. The movement would apparently be the same, whether the car were crowded or empty, because the crowd could have no knowledge of conditions inside an approaching train. Possibly even more anxiety would exist to get into a train that had seats to spare, than to get aboard one that was already crowded. But the condition of this train as permitted to be proved in evidence was its condition subsequently, twenty-five minutes after the accident. This could not, we submit, be a proximate producing cause of the misfortune to the defendant in error.

In the case of *Cary v. Los Angeles Railway Co.*, 157 Cal. 599-603, plaintiff had been thrown from the car by the starting thereof, upon a signal given by a passenger to the motorman, and it was sought to show that the car was over-crowded at the time, in violation of California Civil Code, sections 2102, 2184 and 2185, which are the sections upon which the trial court in the case at bar charged the jury. The Supreme Court of California held as follows:

“It was admitted that at the time of the accident the car was crowded and that passengers were standing in the aisle. Appellants make complaint of the court’s rulings and instructions upon this point, which were to the effect that the fact that the car was crowded with passengers would not entitle the plaintiffs to recover, and could not be considered by the jury, except as a part of the conditions existing at the time. The court’s rulings and instructions in this regard were correct. The crowded state of the car was permitted to be shown as one of the conditions at the time of the accident. No negligence was alleged by plaintiffs because of the crowded condition of the car, and

no causal connection between the crowded condition of the car and the accident was in any way shown. While it is permissible to charge negligence in general terms, it is nevertheless necessary to specify the particular act or acts alleged to have been negligently done. (*Stevenson v. Southern Pacific Co.*, 102 Cal. 144, 34 Pac. 618, 36 Pac. 407; *Smith v. Buttner*, 90 Cal. 95, 27 Pac. 29.) If appellants had desired to predicate negligence upon the crowded condition of the car they should have done so by appropriate allegation. But in this case, if they had done so, it is apparent that no different result would have been reached, since the over-crowded condition of the car was in no way the proximate cause of the accident, *and it is but a matter of speculation as to whether or not the conductor, at the time actually engaged in taking up fares, would have seen the unauthorized act of the passenger who rang the starting bell, if the car had not been crowded.* A violation of the provisions of the Civil Code (Civ. Code, 2102, 2184, 2185) will establish negligence, and where injury results from such negligence a recovery may be had. But in every case the particular negligence to avail plaintiff must have some direct and causal connection with the injury complained of. For example, it is negligence if the whistle of a locomotive engine is not sounded and its bell rung at crossings, but if the train were derailed by a misplaced switch, an injured passenger could not base his recovery upon the showing that somewhere along the journey the whistle had not been blown or the bell sounded when these things should have been done. In such a case the employer will not be liable merely because his act constituted a violation of law, but only if it proximately caused the injury complained of. So although the violation of such a statute is negligence *per se*, there must be a causal connection between the unlawful act and the injury, which must be shown in the pleadings and by the proof or the action fails. (*Nickey v. Steuder*, 164 Ind. 189, 73 N. E. 117; *Hendricks*

v. Cooleemee Cotton Mills, 138 N. C. 169, 50 S. E. 561; *McVay v. Brooklyn etc. R. Co.*, 113 App. Div. 724, 99 N. Y. Supp. 266; *Snyder v. Colorado Springs R. Co.*, 36 Colo. 288, 85 Pac. 686.)”

Cary v. Los Angeles Ry. Co., 157 Cal. 599-605.

It is to be remembered that the railroad company had no way of knowing how many of these people, assembled at the depot, were there for the purpose of going back to Atascadero that night. There is no evidence that any notice was given to the company, except by their presence. Their tickets were good for still another day. There would be eight trains southbound on the next day, and another train that night, thirty minutes later. If the defendant company had had a dozen trains following this one, the disposition of the crowd to board the first one would have only become manifest as it did at the last instant and would have been the same as it was on this occasion. There was nothing to indicate to plaintiff in error that there would be such a demand to board this train until the boarding actually begun, and then it is perfectly apparent that nothing could have prevented the action of the crowd.

The evidence as to the subsequent condition of the train, taken in connection with the instructions as to the duty of plaintiff in error not to overcrowd its train, introduced an improper consideration into the minds of the jury. If the crowded condition of the train was proper to be proved as a circumstance, and not as an act of negligence bearing on the accident, then the evidence should have been left to the jury without instructions as to any violation or compliance with law in respect thereto. Having gone to the jury as acts of neg-

ligence bearing on the accident, the error becomes vital to the case.

“If improper evidence under objection has been admitted, it is impossible for this court to say how much weight and influence it had in the mind of the trial court in framing its findings of fact. The improperly admitted evidence may have been all-powerful to that effect. As far as this court knows it may have been that particular evidence which turned the scale and lost the case to appellants.”

Estate of James, 124 Cal. 653, 57 Pac. 578.

See also to the same effect:

Rulofson v. Billings, 140 Cal. 452-60;

Helling v. Schindler, 145 Cal. 303-14;

Smith v. Westerfield, 88 Cal. 374-383;

People v. Oldham, 111 Cal. 648;

People v. Ah Len, 92 Cal. 282.

“A party cannot, after insisting upon the admission of improper evidence over an objection to its admissibility, defend his course by contending that the error was harmless.”

Rulofson v. Billings, 140 Cal. 452-60.

See also:

Chgo. R. Co. v. White, 110 Ill. App. 23;

Ill. R. Co. v. Ely, 35 So. 873;

Miller v. Hoffman (Mich.), 97 N. W. 759;

M. Groh & Sons v. Groh (N. Y.), 68 N. E. 992;

Gulf etc. Co. v. Ryon (Tex. Civ. App.), 72 S.

W. 72;

Gattis v. Kilgo, 131 N. C. 199, 42 S. E. 584;

Ives v. Ellis, 169 N. Y. 85, 62 N. E. 138;

Moravec v. Grell, 79 N. Y. S. 533;

Maynard v. Oregon R. & N. Co., 78 Pac. 983-6.

POINT III.

THE COURT ERRED IN THE ADMISSION OF EVIDENCE AS TO WHETHER THERE WAS ANYONE REPRESENTING THE SOUTHERN PACIFIC COMPANY, GUIDING OR DIRECTING SAID CROWD (Specifications XIV, XV, XVIII, XIX, XXVIII, XXIX; Exceptions 14, 15, 18, 19, 28, 29), AND ERRED IN GIVING TO THE JURY INSTRUCTION M, AS FOLLOWS:

“I also instruct you that it is the duty of every public carrier of passengers to employ sufficient servants for the protection of such passengers, and it is under obligations to take due care to secure the safety of a passenger who is upon its premises peaceably for the purpose of boarding its trains.”

The instruction could not be couched in more positive or absolute language. “It is the duty of every public carrier of passengers to *employ sufficient servants for the protection of such passengers.*” *Sufficient servants for the protection of the passengers* means nothing less than a complete security of the passengers by the employment of servants adequate to insure such security. This is far beyond the exercise of the highest degree of care for the safety of passengers; it is the actual accomplishment of their safety as a positive result—not merely the highest degree of care in that direction. Charged that defendant must have provided servants *sufficient for the protection* of the passengers, the jury could not possibly do otherwise than say that plaintiff not having been protected, having met with an injury, defendant had failed to accomplish his protection, had failed to employ sufficient means, in the form of employes, to achieve his absolute security, and therefore

must of necessity have found against defendant. The mere fact of injury, to the jury, must have meant that defendant had failed in this absolute duty to “employ sufficient servants for the protection” of plaintiff. Of course it is conceivable that by employing a thousand or two thousand men defendant might possibly have accomplished the protection of plaintiff, but such a thing would hardly be required as the exercise of proper and reasonable care and prudence on the part of the railroad company. But under the instruction given, no number of employes would have been adequate, if they did not result in the safety of plaintiff. The instruction required defendant to insure his safety, and not simply to exercise the highest degree of care, prudence and foresight for that end. Instead of being required to exercise such highest degree of care and foresight, we submit that the learned trial court has erroneously imposed upon defendant the duty of accomplishing a successful outcome of that care, and has instructed that the efforts of the company must be *sufficient to secure protection*.

According to the entire record, there was no reason to anticipate any need for control of the crowd in question. At the immediate time of the injury of the plaintiff, by the sudden act of his fellow soldiers, it is apparent that no direction or orders from the railroad company would have been of the slightest avail.

The law does not require impossibilities or unreasonable things. Here were a few companies of soldiers—vastly different in make-up from an assembly of women or children being carried on an excursion—with officers

among them in uniform. Any force of railroad police or town constables would have had more tendency to provoke riot and disorder than to promote order and quiet. Before the train arrived, to have sent men into this body of soldiers to give them orders or directions, would have been uncalled for and unjustified. There was no reason to anticipate disorder. After the train arrived, there was no intervening time between their disorder and the injury they did to their officer. As shown by the testimony:

“The crowd was very orderly before the train came in. There was absolutely no disorder at the station at all. [Tr. p. 41.] * * * Prior to the time the train came in, it was the most orderly crowd I ever saw of a bunch of as many soldiers. Nothing to give any indication to a railroad company or any one else that there would be any disorder.” [Tr. p. 46, testimony of Capt. H. B. Light.]

“Q. And after the accident happened you exercised such authority as you thought you could make effective and tried to get them back?

“A. To get them out of the way and give the man a show, certainly. Possibly if there had been anything to require control of that crowd before the train pulled in there, if any emergency had been apparent, then I would have done the same thing; if there was anything in the nature of that, I would have tried to do my best. * * * There was nothing to indicate to me or to Captain Ward that there was going to be any disorder in this crowd, prior to the train pulling in. * * *

“There was absolutely nothing that indicated to my mind as an officer that those men were going to need to be controlled. There was no disorder there. The disorder that did happen, absolutely all happened after the train had got alongside of the crowd.” [Testimony of Lieut. William H. Anderson.]

“There was no indication to my mind of any necessity of controlling the crowd before the train pulled

alongside. There were officers of the army present. I did not hear any army officer make any attempt to call the soldiers up in rank or call them in attention—put them in line or rank, or anything of that sort. Before the train had pulled alongside, there seemed to be no necessity for that.” [Testimony of Capt. Henry D. Thomason.]

“I say the crowd was always orderly and quiet, as far as order went. There was absolutely no movement in the crowd up to the time the train came in. * * * I saw nothing at all to make such an indication, and I noted or heard, neither noted or heard anything to lead me to believe that such a matter as a crowd rushing for the train, or rather for a position to get on the train, was going to occur, for the fact that I didn’t think the train was going to stop there, and that was the—the crowd, as the engine passed me, absolutely never moved.” [Testimony of Capt. John Wilbur Ward.]

Such in fact was the entire testimony in the case.

The instruction M, given by the court and above quoted, required plaintiff in error absolutely “to employ sufficient servants for the protection of such passengers,” and placed it under obligations to take “due care to *secure* their safety.” This was not limited to the requirement of such care as might be reasonably anticipated, but amounted to a requirement of assurance or insurance of the passengers against all acts whether the same were indicated or to be anticipated or otherwise. The absence of any person directing or guiding the crowd for the railroad company certainly had no effect on the crowd, which, according to all the proofs, remained quiet and orderly up to the last moment; then there was a rush toward the train unanticipated even by the officers present and, if beyond their power to

control, certainly beyond that of any other human agency to control. We are therefore held for a failure to anticipate disorder, when all the indications were that there would be no disorder, and are charged with negligence in not having men to guide or direct a crowd that gave no sign of needing guidance or direction, and that did not move for want of direction or guidance, but solely of its own sudden impulse.

A failure to anticipate, throughout this case, on the part of the railroad company is made the gist of the cause of action. But from all the record, it is apparent that the event and injury could not have been reasonably foreseen. An act or omission of a party cannot be held to be the proximate cause of an injury, when the same could not have been reasonably foreseen as the probable result of the act.

In *Klatt v. N. C. L. Co.*, 66 N. W. 791-2, the court said:

"These questions, in effect, would require the jury to find whether the negligence of the defendant, if such was found, was also the proximate cause of the plaintiff's accident. It is well settled that negligence alone does not make the defendant liable. The defendant is liable only when its negligence is found to be the cause of the accident. *And this negligence is the proximate cause only when it is of such character as that men of ordinary prudence, judgment, and experience, ought, reasonably, in the light of the attending circumstances, to have foreseen such an accident as likely to occur.* And unless this question of proximate cause is fairly and substantially answered by the special verdict, no judgment can be given on it.

“It is the essence of actionable negligence that the party charged should have knowledge that the act complained of was such an act of omission or commission as might within the domain of probability cause some such an injury as that complained of.”

Lincoln G. & E. Co. v. Thomas (Neb.), 104
N. W. 153-4.

“But unless it could reasonably have been anticipated that the accident which was the immediate cause of the injury would occur, and he was compelled by the act or omission complained of to occupy that place, the injury would, in no legal sense, be the consequence of the act or omission. And it seems to us that there was no evidence of the existence of either of these facts.”

Handelun v. Burlington etc. R. Co. (Ia.), 32
N. W. 4-5.

“Negligence is the proximate cause of an injury only when the injury is the natural and probable result of such negligence, *and in the light of the attendant circumstances, ought to have been foreseen by a person of ordinary intelligence and prudence.*” (The italics are ours.)

Deisentieter v. Kraus-Merkel M. Co. (Wis.),
72 N. W. 735.

“The question is not whether it was a possible consequence but whether it was probable, that is, likely to occur, according to the usual experience of mankind. That this is the true test of responsibility applicable to a case like this, has been held in very many cases, according to which a wrongdoer is not responsible for a consequence which is merely possible, according to occasional experi-

ence, but not for a consequence which is probable, according to ordinary and usual experience.”

Stone v. Boston & Alb. R. Co., 171 Mass. 536,
51 N. E. 1.

“Every defendant shall be held liable for all of those consequences which might have been foreseen and expected as the results of his conduct, but not for those which he could not have foreseen, and was, therefore, under no moral obligation to take into consideration.”

Parsons on Contracts, Vol. 2, p. 456, quoted with approval in Peoria v. Adams, 72 Ill. App. 662-72.

“That negligence is the proximate cause of an injury from which the injury might and ought to have been foreseen, or reasonably anticipated, under the circumstances, as its probable result.”

Holwerson v. St. L. & S. R. Co., 57 S. W.
770-4.

POINT IV.

THE COURT ERRED IN PERMITTING PLAINTIFF JOHN WILBUR WARD TO TESTIFY AS TO HIS NUMBER OF ACTUAL ENGAGEMENTS IN WAR (Specification XX, Exception 20), AND AS TO HIS DUTIES WITH REFERENCE TO THE POST EXCHANGE. (Specification No. XXI, Exception 21.)

The court, over the objection of defendant, allowed Captain Ward to tell the jury the number of actual engagements in war in which he had participated. This evidence threw no light on any issue in the case and portrayed the plaintiff to the jury as a brave man who had served his country in many battles. It cannot be

said that a defendant is assisted to a fair and dispassionate verdict by the introduction of such evidence. The evidence could not properly be admissible to show the value of his career in the army, for many an officer of equal merit and bravery might never have seen an actual engagement.

POINT V.

THE COURT ERRED IN PERMITTING PLAINTIFF JOHN WILBUR WARD TO TESTIFY AS TO THE PROVISIONS OF AN ACT OF CONGRESS CONCERNING RETIREMENT AND PROMOTION OF OFFICERS. (Specifications XXXIII, XXXIV and XXXV, Exceptions 33, 34, 35.)

The testimony of the witness, which will be found in the transcript at pages 96 and 97, was plainly hearsay. The plaintiff was permitted to testify not only to the legal effect and contents of an act of congress but was further allowed to testify that he himself would have enjoyed a certain order of promotion in the future, all of which was apparently pure speculation and conjecture.

POINT VI.

THE COURT ERRED IN PERMITTING PLAINTIFF JOHN WILBUR WARD TO TESTIFY AS TO THE COMPUTATION AS TO THE AMOUNT OF MONEY WHICH HE WOULD HAVE EARNED BY THE RULE OF PROMOTION TO THE AGE OF 64 AND IN PERMITTING HIM TO STATE SAME IN THE SUM OF \$106,000.00. (Specification XXXVI, Exception 36.)

The plaintiff was permitted by the court to sum up the entire problematical earnings that he considered

he would have gained up to the age of 64 and to give to the jury the total thereof. The verdict in this case was large, but whether it was large or small, it strikes us that in personal injury actions, it is a dangerous and improper thing to permit a plaintiff to sum up and present to the jury his speculation or estimate as to the amount of money he would have been able to accumulate during his life, if he had not been injured.

POINT VII.

THE COURT ERRED IN GIVING TO THE JURY INSTRUCTION N, AS FOLLOWS:

“You are further instructed that if it is shown that two parties have contributed to the injury of a third person, then notwithstanding the act of one of such two parties may have been reckless and that of the other simply manifesting the want of ordinary care, neither of such parties is relieved of liability for an injury to such third person who was not himself guilty of contributory negligence.”

The foregoing instruction is based on the idea that though the injury to Captain Ward was done by the act of some other person or persons, still if the defendant company contributed to the injury by negligence, it would be liable. The instruction fails to limit itself to negligence directly or proximately producing the accident or contributing thereto. Nowhere in the instructions does the court seem to have cured this by giving to the jury a direction that negligence, to be actionable, must be proximate to the injury. Under the instruction above quoted, the jury may have felt that the conduct of the railroad company in not having plenty of room in the train “simply manifested the want

of ordinary care," and that together with the reckless conduct of certain soldiers, this condition had contributed to the injury of Captain Ward; and under such view, the jury would have been obliged in conformity with the instruction above quoted, to find for the plaintiff. We believe the instruction was in error, for the reasons aforesaid.

All of which is respectfully submitted.

J. W. MCKINLEY,

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Attorneys for Plaintiff in Error.



No. 2249.

United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

SOUTHERN PACIFIC COM-
PANY, a corporation,

Plaintiff in Error,

vs.

JOHN WILBUR WARD,

Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT OF THE CASE.

This is an action for personal injury, the crushing of the leg of Defendant in Error under a passenger train of Plaintiff in Error, requiring amputation of such limb at the knee-joint. The injury occurred at the Railroad station of Paso Robles, San Luis Obispo County, California, on October 8, 1910, at about 10:50 p. m. o'clock.

The Defendant in Error was then First Lieutenant of the Thirtieth Infantry of the United States Army, Commanding Company M., and was also in charge of the Post Exchange of such Infantry in camp at Atascadero, in said county, eligible to all the rights, salaries, emoluments and promotions in rank and honors belonging to such an officer of the regular Army of this Country. He was then of the age of thirty-five years. (Admitted allegations of Complaint.)

Atascadero, ordinarily a mere station for shipping cattle, is twelve miles south of Paso Robles station, and during the months of September and October, 1910, was the scene of a grand Encampment for Military Maneuvers of the United States Army (Western Division) and the National Guard of California.

During these two months, there were between 5000 and 10,000 soldiers, including their accompanying civilians, located at Camp Atascadero. (R. 32, 48).

The Paso Robles Hot Springs Hotel, near Paso Robles Station, is owned by "some of the Southern Pacific Company." (R. 168-169.) The "U. S. Army Maneuvers," at "Camp Atascadero, California"—"near Paso Robles Hot Springs" for "September and October, 1910," were advertised some weeks previously by Plaintiff in Error in posters cut in colors. (R.35 and 36). A folder, "advertising Paso Robles Hot Springs," "the said army maneuvers at Camp Atascadero" and "containing a map and a *special* schedule of trains between Atascadero and

Paso Robles," was also circulated by Plaintiff in Error. (R.33-35.)

"Said train service *will be* inaugurated between Paso Robles and Atascadero," etc. (R.34) ; but Train No. 20—due at Paso Robles at 11:16 p. m., according to said advertised schedule, did not run. (R.88.)

On October 8, 1910, and from the beginning of the Army maneuvers, thus advertised, the Southern Pacific Company retained an extra agent at Atascadero. In fact, there were two agents "there during the encampment." (R. 87).

The Railroad line between Paso Robles and Atascadero, admittedly is and was a part of a main highway, conducted by Plaintiff in Error, from San Francisco to Los Angeles, and was under its exclusive control at the time of Plaintiff's injury on October 8th, 1910. (R. 6.) On said October 8th, "they were having some sports of different natures at Paso Robles, swimming contests, band concerts and swimming races." (R. 37, 89.)

An excursion ticket from Atascadero to Paso Robles and return was sold to Defendant in Error and to "a very large portion" of "the soldiers and officers of the United States Army and the National Guard who were at Paso Robles" on said October 8th. (R. 88-89. 36, 48, 59, and 76.)

"The swimming contest was pulled off about half or three-quarters of an hour after the schedule time, and occurred about a quarter to nine o'clock. It was scheduled for eight o'clock. The next train after

that contest was over was the Sunset Express, which was due at about 10:46." (R. 90).

Only this train went south (back to Atascadero) after the swimming event. (R. 88.)

After the events of the day and evening at Paso Robles Hot Springs Hotel were concluded, the Excursionists, among them the Defendant in Error, gathered at Paso Robles Station, their previously purchased tickets in pocket, awaiting the arrival of the only train available for their return to their quarters at Camp Atascadero. The number of these Excursionists who thus were waiting at said station is variously estimated from 450 to 1000. (R. 49, 60, 78, 93, 37.)

This crowd, that had purchased its passage, hours previously, to patronize a place owned and advertised by the transportation company, this comparatively small fraction of the military men whose presence in that section of the country had been largely heralded by posters and folders as hereinbefore noted, was thus standing at the depot waiting as passengers (R. 40, 60.) when the train of Plaintiff in Error came into the station at a rapid and dangerous rate of speed, about twenty miles per hour. (R. 8.)

Several of the witnesses estimate the speed at twenty-five miles per hour. (R. 39, 50, 79, 93).

As narrated by Dr. Thomason, Captain, Medical Corps of the United States Army: "As the train went by I did not see anyone attempting to board the train while it was in motion. I should say the speed of the train was in the neighborhood of twenty or twenty-

five miles an hour.” “I have boarded a good many trains under all circumstances and in a good many stations throughout the United States. I can say that, riding an automobile, I think I know what twenty or twenty-five miles an hour speed is.” (R. 79-80.)

As stated by another: “I said the greatest part of the crowd was near me here in front of the station. *They got away from the train. The train passed so fast that the crowd even backed towards the station, the waiting-room.*” (R. 73.)

As described by still another: “I don’t know just exactly how fast the train came in, but I know it was coming in fast. It came in faster than you generally see a train come into a station. I have seen several trains come into stations and I don’t believe I ever saw one coming into a station as fast as that one came in.” (R. 66.)

As testified by Captain Light: “A man would have been a fool to try to board the train the rate it came in.” (R. 47.)

Or as admitted upon cross-examination by Herbert Symonds, a witness for Plaintiff in Error: “I didn’t see anybody trying to swing on the train as the train came in before it stopped, no soldiers nor any person whatever, not a bit of disorder in that crowd at all—*just like an ordinary crowd, waiting to take the train; the congestion that followed there at the time the train arrived was like you would get on the train at the Pacific Electric today; it would be the same way; there would be a crowd trying to get on.* I had oc-

casion to note the speed with which that engine went by. I couldn't estimate the speed in miles at the rate it was going, because I couldn't tell whether it was going five miles or twenty-five miles; I couldn't compare it with anything. My impression was that it seemed to be the impression of everyone in my section of the crowd that *it was not going to stop,*" etc. (R. 156-157.)

As a safe or dangerous rate of speed for a passenger train to enter a station is relative rather than absolute, depending upon particular environment and circumstances—we deem it helpful to this Court to describe the Station, tracks and conditions as they existed on the night of October 8th, 1910—when the injury was inflicted, before completing this statement.

The Exhibit Views, No. 1—No. 6—and a map, Exhibit 1, (R. 177-183.) introduced in evidence by the Plaintiff in Error, are conceded to be substantially accurate, except that it was stipulated at the trial that "none of the lights shown on such Exhibit Views were in existence at Paso Robles Station at the time of the accident." (R. 107.) "There was only one light there outside of the station." (R. 90.) "The light throughout the space was dim." (R. 77.)

The testimony of former Superior Judge Hyland (incorrectly spelled Highland), in connection with the above Exhibits and Map, will, we believe, make clearer the situation and location of the crowd, waiting as Excursion Passengers, with their tickets, for the all but fatal train.

The Map shows the general disposition of the "Paso

Robles Depot," "Waiting Room," "Baggage Room Door," "Freight Platform," and different tracks. "Outside of the building proper here it is all level," with the exception of the freight platform, a little southward of the "Waiting Room." (R. 30-32, 183).

"This platform has an elevation of about four feet," and on the dimly lighted night of October 8th, there were three freight cars standing on what is designated upon the Map as the "House Track," *next* this elevated "Freight Platform. "Defendant's Exhibit View No. 4." (R. 180.) affords an excellent, though partial illustration of the uncontradicted testimony of the witness, Roy Knowles, upon this point, as follows: "I saw the freight car there that evening. What fixes it in my memory now is that I was sitting on top of the car. Just three cars were along there. There was ten or twelve men sitting on top of that car, besides myself, before the train came in. Pullmans were behind the day coach; there were three or four coaches ahead here where the last one stopped."

"The crowd swung into this narrow space along here" (i. e. between said freight cars and said "Main Track" upon which latter the Southbound train came into Paso Robles Station) "to try to get space there or passage on the car; right in between the freight-car and the passenger coach. I did not see Captain Ward at the time the accident happened to him, nor afterwards." (R. 64.) (Captain Ward's position will be shown hereafter.)

This testimony is corroborated by that of other witnesses. (R. 38, 51, 71, 77 and 157.)

Moreover, Albert Hood, Conductor of "train number 10, the Sunset Express, on the night of October 8, 1910, when Lieutenant Ward was injured," (R. 108) admitted upon cross-examination the existence of the obstructive freight-car. We quote his words: "There was a freight-car there that night, just about where that car is in this photograph here; right opposite the steps (see Defendant Exhibit View No. 4 and shadow of said car in Defendant's exhibit View No. 2, R. 180-178.). We ran our baggage-car, the door, down opposite the freight-car." (R. 111.) The distance of thirteen feet (R. 131.) between the "House Track," on which these freight-cars stood, and the "Main Track," on which the passenger train came into the station, would, after allowing for the over-hanging width of the cars on these tracks, be, indeed, "a narrow space," probably about ten feet.

And, to employ the language of a witness for Plaintiff in Error, "when" the train "finally did stop, "why "*the only cars that had any light on them*, that "is the cars that seemed light, some of the passenger "cars, were the cars in *front* of the train, and we all "were going *in that direction to get on*. I know the "particular car that was in front—that Captain "Ward was in front of—was dark, and my flashlight "gave the light around there." R. 157). * * * "When the train came in, I was not down that far, "down this *narrow space*, in that direction to the "south there toward that car. I know I went on that "track; *the general crowd* pushed me in that direction; it seemed to me *the only cars to get on, to board "the train, was down that way.*" (R. 157-158.)

The majority of the crowd was standing in front of the waiting room, and "when the day coaches passed, the crowd moved up in toward these box-cars." "The head of the rear day coach just passed the first box-car; the rear of the day coach was just past the waiting room." (Ev. of Witness Young, R. 71.)

"There were ten or eleven cars on that train," according to the Engineer. "They were the express, baggage, smoker; the usual make-up of Number 10—was the express, baggage, smoker, two day coaches, and the rest were sleepers and the observation-car." (R. 137.)

It would thus seem that three general passenger cars, the smoker and two day coaches, were the "only cars that had any light on them, that is the cars that seemed light."

It would also appear that these cars were "the only cars to get on, to board the train," and that they were down the "narrow space." After the accident, they "had to go past the (obstructive) freight-car to get "the stretcher to the baggage-car." (R. 157 and 77.)

It further appears that these three cars were crowded before the train arrived at Paso Robles Station. (R. 63, 43 and 73.) The fact of such congestion and lack of accommodation for these Military Excursionists, who hours before had purchased their tickets and whose presence had been solicited at a resort owned by "some of the Southern Pacific Company" and whose encampment had been especially advertised by such company for more than six weeks, was well known in advance by Plaintiff in Error.

In the plain words of an uncontradicted witness: "The condition of the car was packed; there was not "room for anybody to squeeze through from one end "of the car to the other. There were men sitting on "the sides of the seats, *standing in between the people "that had occupied the train before it arrived at Paso "Robles, standing in back of them and in front of "them."* (R. 43). (See R. 63 and 73). The quick observation of the soldiers, anxious to return to their quarters late at night, at once apprised them of the very limited accommodation provided for them in the number of cars, lighted and unlighted. They instantly recognized that the unlighted cars or those that seemed thus, were not for them, while through the windows of the lighted cars, they perceived' "the people that had occupied the train before it arrived at Paso Robles." As stated by a witness: "The first coach was crowded so *I could see from where I was standing, there was no use trying to get on that.* And when I tried to get on the second coach it was crowded, and I just did get in, and I stood up all the way into Atascadero." (R. 73.)

"When the day coach passed the waiting-room, the crowd began to move in that "narrow space" between the train and the box-cars. * * * The *first part* of the train was *lit up*, but the coaches that *stopped directly in front of the waiting-room* were *darkened*. I took the coaches to be sleepers, they were darkened, and the remainder of them in front were lit up. I am positive about that. These rear coaches were unlighted." (Ev. of Witness Samuel Young, R. 72.) People go to bed in Pullmans and

they are then darkened at the hour that train reached Paso Robles. (R. 131.) To add to the exasperating conditions, already described, the train was from 10 to 15 minutes late. Mr. Coburn, the Engineer in charge, testified: "We were ten or fifteen minutes late." (R. 136). "We had no special instructions with reference to slacking our speed there on account of the different crowd. *We always use care where there is a crowd.* There was no run-late order. We were about fifteen minutes behind time at that point." (R. 139.)

"When orders are given by train-dispatchers for "the running of an engine or a train, those orders are "also within the knowledge of the fireman. I do not "remember receiving any orders from the company "in reference to running on regular schedule; we were "fifteen minutes behind time of that schedule, some- "thing to that effect." (Ev. of Mr. Mulvaney, the Fireman, R. 142.)

"It is a custom of engineers and conductors to "make up time on a regular schedule if they possibly "can, unless they have a run-late order. *They undoubtedly might have been trying to make up the "time*, but, as I say, it is an impossibility on that run." (R. 143.)

In addition to the gross neglect of the Railroad Company to provide any regulations whatever for its passengers at and on its station premises, also to provide proper accommodation inside its cars, and besides the highly dangerous rate of speed at which its train was driven into the station; there was still

another element of culpable negligence upon its part. This was the failure of the company to take any action for the purpose of maintaining such order in said crowd upon its premises at said station of Paso Robles as would prevent the scramble, surging and peril that ensued when the swiftly moving train arrived, not that there was any previous disorder, but that the above conditions, as shown by experience, always require wise control and cautious authority from transportation companies.

As stated by the witness, Lieutenant Anderson: "There was no disorder there. The disorder that did happen, absolutely all happened after the train had got alongside of the crowd." (R. 58.) "There was not a single human soul there, either at the time just before the train came in, or while it was coming in, who resorted to violence against any of his fellows there." (R. 59.)

Or as phrased by another witness: "I did not see any disorder in the crowd; nobody running. As the train was coming on, the crowd just moved toward the train, *all along*. The crowd was all around there on that asphaltum foundation, which was flush with the tracks, scattered around there." (R. 64.)

Or as put by the Defendant in Error: "No man lifted a hand of violence against me. There was not any drunken men there. No one used any violence toward me. There was nothing that occurred outside

the natural surging of that crowd to get accommodation on that train before this accident occurred to me.” (R. 93.)

There was no one representing the Southern Pacific Company who attempted in any way to guide or direct the crowd about boarding the train. (R. 74.) No one gave any warning or any direction as to the manner in which the crowd should take that train (R. 80, 93-94) and “there was no agent there at all among the crowd.” There was, however, “a man selling tickets,” for which the Company, through some of its agents knew or ought to have known, there was no accommodation. (R. 94. also 80.)

Recurring now to the position and conduct of the Defendant in Error at Paso Robles Station before and at the time of the injury.

Dr. Thomason says that he met and talked with Captain Ward, about twenty-five minutes before the train came in, that he occupied this entire time talking with him; that they walked throughout the station space several times, that when the train was reported coming or was due, they “came forward and occupied a space to the north of the waiting room, a little back from the track.” (R. 76, 77.)

“At the very time the train came in I was directly next to Captain Ward on the southward side. *Captain Ward was, I should say, six or eight feet away from the tracks at the time the train came in.* When the engine went by there were a few persons ahead of him, and *we were both surrounded on all sides, in*

front and behind and on either side, by a crowd of people. It is my recollection that there were other men closer to the track than he.” (R. 80-81.)

“Immediately after the engine passed there was a sudden stopping of the train, and the brakes were put on, and the train began stopping very quickly. At that, *I felt myself being carried toward the train, and in a southward direction.* I was separated from Captain Ward. He disappeared. After the train stopped I heard several say—‘A man under the train!’—and I turned northward and found Captain Ward sitting on the ground, as I recollect it, facing the north, and holding on to his leg, at the same time giving directions to some of the men to find Dr. Thomason, that he was in the crowd somewhere, etc.” (R. 81.)

Captain Light stated the matter thus: “I saw the accident happen to Captain Ward. I was standing about between ten and twelve feet to the rear of Captain Ward and the Officer that he was talking to at the time the accident occurred. From the time that we saw the headlight, the train came on, as I say, at about twenty-five miles an hour; didn’t seem any more than the snap of your finger until the time it was passed us, *and of course the crowd started to move along,* and I saw someone fall ahead of me. By that time I had closed in a little closer to the crowd. And there were some people in between Captain Ward and the train, surging forward themselves to meet the train. (R. 40.) The train had’nt

stopped, but had kept moving until after Captain Ward was hurt. It hadn't made a stop and then started again; the train was in motion when he got hurt. He did not try to board it. I know, because there was people between him and he couldn't try it. There were people between him and the train. I did not see any of those people trying to board it," etc. (R. 47.)

The Defendant in Error narrated at some length the events that preceded the injury, after his arrival at Paso Robles Station to take passage upon his return ticket to Atascadero. (R. 90, 91-92.)

Thereupon, he testified as follows: "We stood "side by side, Captain Thomason and myself, looking "at it. I was on the point of making a remark that "I didn't thing the train was going to stop, when I "heard the—possibly the brakes go on; heard some "kind of a noise of grinding, like that—and about "that time a surge of the crowd separated us. I "don't know where Mr. Thomason went or anything "else."

"It seemed to me like in a second or two I found "myself in a whole bunch of men right out next to the "train, and the first I knew I was under it. I do not "know how many cars or wheels passed over me. At "no time there that night after that train was in "sight until the accident occurred to me did I make "any attempt to board that train" (92-93.) Captain Ward's Cross-examination upon this point will be found at pages 99-104 R.

The jury rendered a verdict in favor of Defendant in Error for the sum of Fifteen Thousand and Five Hundred Dollars, and Judgment was entered therefor.

A motion for a new trial having been heard and denied, plaintiff in error brings this Writ of Error.

ARGUMENT AND AUTHORITIES.

The facts sustaining the foregoing Statement having been conclusively determined by a jury, the responsibility of Plaintiff in Error follows both in reason and authority.

“It is negligence for a railroad company to fail to observe, for the protection of another, that degree of care, precaution, or vigilance which circumstances justly demand.”

Barrett vs. Southern Pacific Co. 91, Cal. 302.
Cooley on Torts, 630.

The doing or omission of an act by a public carrier, which by the experience and consensus of opinion of mankind would create danger to passengers is legal negligence.

Carrico vs. West Va., etc., Ry. Co., 35 West Va.,
389.

The rights of a passenger, who is waiting to take a train, his ticket in his pocket, as was Defendant in Error, at the only place he could wait, the railroad

station, are not left to the “sport of chance or the negligence of careless agents or servants.”

Philadelphia & Reading Ry. Co. vs. Derby 14
How 468 (55 U. S.)

Steamboat New World et al. vs. King 16, How
469.

“It is now the settled rule of the Federal Courts”
(we quote) “that *passengers using station premises*
“for the purpose of taking or leaving trains have a
“right to assume that the place is one of safety, and
“to act upon that assumption.”

Chicago, Rock Island & Pac. R. R. vs. Stepp, 90
U. S. Circuit Court of Appeals 431-438.

The case is different from one approaching a railroad crossing away from a station; there he is bound to know that the place is one of immediate danger. The passenger, however, has the right to believe that station premises he is using are safe.

(Case last cited.)

“It is the duty of a railroad company to provide suitable stations and platforms to enable persons to *enter its cars*, and passengers to safely alight when they have accomplished their journey.”

N. Y. R. C. vs. Doane, 115, Ind. 435.

Langan vs. St. Louis, etc., Ry. Co. 72, Mo. 392.

Campbell vs. Y. and M. V. Ry. Co. 48, So. 618.

Archer vs. N. Y. N. H. & H. Ry Co. 106, N. Y.
589.

Ayres vs. D. L. & W. Ry Co., 5 Amer. Neg Rep.
683.

“Railroad companies, in the enjoyment of their franchises and in the performance of their duties, should have a proper regard for the safety of the persons whom they invite to their depots. They should omit no act, the omission of which would endanger the lives or limbs of those who seek to ride upon their trains.”

Chicago & N. W. Ry. Co. vs. Fillmore 57, Ill. 265.

“Negligence is a question for a jury where defendant permitted its station platform to become overcrowded with persons waiting for trains, so that one of them was pushed off the platform and injured. When plaintiff entered upon the platform, it was a safe place (same as case at bar) and *he had a right to assume that no part of it would be rendered unsafe by any act of defendant.*”

McGearty vs. Manhattan Ry. Co., 43, N. Y. Sup.
1086.

The Defendant in Error was a Passenger of Plaintiff in Error. He was at and upon the station premises of the Plaintiff in Error at least twenty-five minutes before its train arrived, his ticket to Atascadero paid for in his pocket.

“A person is a passenger when he enters the prem-

ises of a carrier with the intention of becoming a passenger, and the responsibility of the carrier begins.”

Riley vs. Vallejo Ferry Co., 173 Fed. Rep. 331.

“A person who has bought and paid for his ticket and is upon the station platform of the carrier about to commence his journey is a passenger.”

Sorensen vs. Ill. Central Ry. Co., 155, Ill. App. 606.

“The obligation of a railway to take due care to secure the safety of *a passenger who is on its platform to board its train* is generally recognized.”

Penn. Ry. Co. vs. Stockton, 184 Fed Rep., 422.

“Where a railroad company has reason to expect a crowd at a station, it should make reasonable arrangements to control the movements of the passengers, so as to prevent them from involuntarily injuring one another.”

Hogan vs. S. E. Ry. 28 L. T., 271.

As said in Nilson vs. Oakland Traction Co., 10 Cal. App. 109: “The rule seems to be well settled as “stated by Hutchinson on Carriers, section 1005, that “a person may become a passenger without having “come into the carrier’s vehicle, if the surrounding “circumstances show an intent on his part to become “a passenger and an acceptance of him by the carrier as a passenger. The text is illustrated by “reference to a case where a man was hurt by the “starting of an omnibus just as he was putting his

“foot on the step, the driver supposing that he had entered. It follows, therefore, from the facts alleged that plaintiff was entitled to the *same care* as the law requires on behalf of passengers. *This is the highest degree of care in their transportation* and if injury results to the passenger in consequence of the failure of the carrier to exercise such care, an action for damages will lie.”

In Penn. Ry. Co. vs. Stockton, *supra*, the Court practically adopts the entire spirit and part of the language of Section 2100 C. C. of Cal. After defining the obligation of a railway as above quoted, the Court then immediately says: “Carriers of passengers are bound to exercise *the utmost care* in maintaining order and guarding those they transport against violence from whatever source arising, which might be reasonably anticipated or *naturally expected* to occur. The general rule is clear that from whatever source the danger may arise, if it be known or should have been known, care must be exercised to protect the passenger from that danger.”

The Civil Code of California (Sec. 2100) reads: “A carrier of persons for reward must use *the utmost care* and diligence for their safe carriage, must *provide everything necessary* for that purpose, and must exercise to that *end* a reasonable degree of skill.” No other statute in California touches the matter.

As no one can enter a general train except at the station appointed for that purpose, and as such a station is one of the things necessary for the purpose of being transported by rail; it follows as inexorable logic that either the law is as stated in Penn. Ry. vs.

Stockton, *supra*, or the passenger is left to the sport of chance—something repugnant to reason.

The contention, we here make, is not that a transportation company should always be held to the highest degree of care to those who are merely upon its station premises, and who may or may not become or be accepted as passengers, for such a rule might render the company responsible to loungers or trespassers. The true doctrine is that one who, in fact and within the intent of the law, is a passenger properly waiting or occupied in the business preliminarily necessary to his actual carriage, is entitled to “the utmost care” or “highest degree of care” from the carrier “against violence from whatever source arising, which might be reasonably anticipated or naturally expected to occur.” One about to alight from a train occupies no better position than one about to board a train.

An injury inflicted upon one, through the negligent operation of transportation instrumentalities, who is bidding his relatives farewell at a station is equally reprehensible with an injury inflicted upon one, in the otherwise similar manner, whose return from a journey is being welcomed.

“Carriers by land as well as on water, with power “conferred by law to protect passengers *who have committed themselves to their care*, ought to be held “to the greater degree of diligence in guarding them “from the negligence of their fellow passengers, when “as prudent men, knowing the surrounding facts, “they might well anticipate from the attendant cir-

“cumstances, that the acts in question might be attended with injury.”

West Memphis Packet Co. vs. White 38, L. R. A. 427.

“A carrier of passengers for hire is bound to give all reasonable facilities for the reception and comfort of passengers, and to use all precautions as far as care and human foresight can go for their safety, and is answerable for the smallest negligence in himself and his servants.”

Ramjik vs. Austro-American S. S. Co., 186, Fed. 417.

“A carrier owes to a passenger the exercise of *the highest degree of care for his safety* consistent with the practical operation of its road, and *if lighting its platforms and premises is necessary to the exercise of such a degree of care*, it is the duty of carriers to do so.”

Ardison vs. Ill. Central Ry. Co., 155, Ill. App. 274.

A carrier must employ sufficient servants for the protection of its passengers.

Kuhlen vs. Bost., etc., Ry. Co., 193, Mass. 341.

“*The duty of the carrier to exercise a high degree of care extends to the time of passage of the passenger from the depot to the train.*”

Merrill vs. Mich. Central Ry. Co., 158, Ill. App., 38.

“The term—‘negligently’—means the failure to “use the highest degree of care.

“The ‘highest degree of care’ means the utmost “care exercised by prudent and skillful persons in “the management and operation of railroad trains.”

Louisville & Nashville R. Co. vs. Kemp’s Adm’r.
(Court of Appeals of Kentucky.) S. W.
Rep. Vol., 149, p 835-836.

THE RESPONSIBILITY FOR AN ADVERTISED EXCURSION.

The resort of Paso Robles Hot Springs Hotel, a special schedule from the military Camp to the station of such resort, the rate of fare, and the nature of the tickets (R. 33-35) which were excursion tickets (R. 36, 88-89) were specially advertised by the Southern Pacific Company. An Army Officer testified upon this point: “There were five copies of those posters sent me at the same time the pamphlet was sent, with a request to post it in a conspicuous place in the army.” (R.35.)

It will not relieve the company from responsibility to say that the *ordinary* travel at Paso Robles did not justify the enclosure or policing of its station premises there, in view of the above fact and the fact that the presence of several thousand military men at Camp Atascadero “near Paso Robles Hot Springs” during September and October, 1910, was also specially advertised by such company. (R. 36.)

The company, for the express purpose of gain, made lawful efforts to increase its passenger traffic in that section of the country, and by reason of such efforts, commendable in themselves, it also thereby created for itself the bounden legal duty to make suitable preparations and take proper precautions in conducting its transportation affairs.

If the company expected to increase its revenues from the public, it was certainly required by law and reason to do its augmented duty toward that public.

It had no right to apply its every-day methods of handling passengers to new and vastly different conditions, which it by its own advertisements had helped to create.

The company had sold tickets, hours before the accident, at Atascadero from Atascadero to Paso Robles and return—tickets printed with and at the time of the announcement of the September and October “Schedule of special and regular service between Paso Robles Hot Springs and Atascadero,” and the company, hence, had notice and knowledge of the number of passengers whom it had agreed to accommodate on October 8th. (R. 34, 88-89).

In *Taylor vs. Penn Ry. Co.*, 50 Fed. 755-759, it is said in relation to advertised excursions such as the one at bar: “Where a railroad company by reason “of advertisements and reduced rates induces an unusual crowd to collect at its stations, it is bound to “use such means as are reasonably necessary to prevent injury to individuals from the conduct or *presence* of the crowd in passing to and from its trains.”

In *Harmon vs. Flintham*, Vol. 196 Fed. Rep. No. 5, August 8, 1912, at page 638, this principle is clearly ruled by the Court as follows: "It is obviously a "reasonable rule, deducible from the principles of law "governing common carriers, that a carrier's pro- "posal through "advertisement to conduct an excur- "sion calculated to induce people to travel in unusual "numbers *implies* that it will furnish *greater facili- "ties* to accommodate and care for those who avail "themselves of the proffer than its usual service re- "quires. *This applies to the stations and crowds as- "sembling there*, as well as to transportation."

The Court then cites a number of apposite author- ities, and, at the bottom of page 639, thus proceeds:

"It is certain that the railroad specially invited the "public to assemble at its stations and then at this "station *took no steps out of the ordinary character* "to warn the people gathered there of any danger or "even to warn the plaintiff of her proximity to the "zone of danger; and it is in vain to say that her "conduct can be held, as a matter of law, to have "amounted to contributory negligence."

"As Justice Brewer said in (the much-cited case) "*Richmond & Danville Railroad Co. vs. Powers*, 149 "U. S. 45, 13 Sup. Ct. 749, 37 L. Ed. 642: "It is well "settled that, where there is uncertainty as to the "existence of either negligence or contributory neg- "ligence, the question is not one of law, but of fact, "and to be settled by a jury; and, this, whether the "uncertainty arises from a conflict in the testimony, "or because the facts being undisputed, fair-minded "men will honestly draw different conclusions from "them."

The case at bar shows three different but concurring types of negligence, and each of them points irresistibly to the company's responsibility.

1st. The company neglected to run enough cars to accommodate the passengers to whom it had sold tickets, and who, it knew in advance, from the fact of such sale, would expect and try to secure accommodation. "A railroad company which fails to furnish comfortable sitting accommodations for its ordinary number of passengers or even for an extraordinary number upon *due notice*, is certainly negligent, and should be held to strict accountability." *Quinn vs. Illinois Central Ry. Co.*, 51 Ill., 495. "The operation of an overcrowded car is *prima facie* an act of negligence." *Math vs. Chicago City Ry. Co.*, 148 Ill., App. 379.

2d. The company neglected such reasonable precautions as its experience and foreknowledge showed, or ought to have shown, to be prudent and necessary to render its Depot-grounds safe for its passengers; neglected to warn or police the crowd that, it could reasonably have anticipated, would naturally surge forward when such crowd saw the train, its limited number (three) of lighted passenger coaches, and, through these lighted windows, also perceived that "the first coach was crowded" so there was no use trying to get on that. (R. 73).

3d. The company neglected to run its train into Paso Robles Station under proper control or at a safe speed, but ran at a very dangerous speed where such

a large crowd was gathered at an unenclosed and unguarded yard.

Perhaps, the law governing the case at bar was never stated with closer or more perfect analogy than as expressed in the damage case against the Pennsylvania Railroad Company wherein United States Circuit Court Judge Buffington, in speaking of a crowd of 195 persons who were at a railroad station seeking to board an incoming train, said: "What was *the duty* of the company with reference to this crowd awaiting this incoming, belated train? *There was no doubt such a crowd called for oversight and control* to prevent danger from the train.

"The Conductor, Neill, testified: 'They seemed to be very impatient; made a rush for the train'...*That was to be expected.* * * * Under the *facts proven in this case—the size of the crowd, the absence of gates, the lateness of the train, the number of passengers boarding it, and the absence of any officials whatever to safeguard such a surging throng of people, selfishly intent, as experience shows such a crowd is, to board the cars and get seats and apt to move forward by common impulse as a train, and especially a late one, approaches—all these are facts from which a fair-minded man might infer that the railroad had failed to exercise that supervising control over a large, inconsiderate crowd, which a due regard for the safety of passengers demanded; for, as said in Cannon vs. Midland, 'When a railway company, for an excursion or other special purpose, invites numbers to its station, it is not unreasonable to require more than the ordinary attendants to perform the same duties which devolve upon the usual staff at other times.'*"

“The crowd was not extraordinary. It was one
“from which, uncontrolled, an accident might result,
“and the railroad, although equipped to control it and
“proving it was its duty to handle the crowd properly,
“simply left it to take care of itself. Under this
“situation, a jury might fairly infer that absence of
“any care was a lack of due care, and negligence is
“the lack of due care under the circumstances.

Penn Ry. Company vs. Stockton, 184 Fed. 422,
426.

The case just cited was upon a Complaint in two counts, both of which were upheld by the Federal Court.

All the elements, upon which responsibility was predicated in the Stockton case, viz: The size of the crowd, the absence of gates, the lateness of the train, the number of passengers to board it, the absence of any officials whatever to safeguard a surging throng of people, selfishly intent to board the cars and get seats, and the question of the rights of excursionists—concur in the case now before this Court.

And here, there are also, the added elements of dangerous speed, overcrowded cars, obstructed and dimly lighted station premises. [The peril of the speed will hereinafter be further discussed]. The overcrowded cars directly proved not merely an abstract but vital negligence, for the first and swift impression of the crowd as the train arrived, that there was not sufficient accommodation was thus confirmed. Reason abundantly suggests that this neglect to provide proper accommodation, being seen

by the crowd as the train came in, (R. 73.), greatly increased the danger of the “surging throng,” especially when the speed of the train was higher than usual for the entry of the Depot grounds.

That, withal, it was late at night, the crowd not unnaturally impatient, the train tardy, the ‘light throughout the space dim (R. 77.),’ the only lighted and partially available three coaches driven opposite a “narrow space”—about ten feet wide—for the use of a crowd of 500 to 1000 persons, (R. 158)—warrant, we think, the firm conviction that the case of Mr. Stockton was, in many essentials, not so strong as that of Captain Ward.

Yet, Plaintiff in Error seeks to escape responsibility for its manifold negligence upon the theory that Captain Ward, or some others, or the whole crowd, was guilty of the only negligence that the law will deem the proximate cause of the injury.

If it were true, which it was not, that any member of the crowd was guilty of concurrent negligence with the Railroad Company in causing the injury, the Company still could not relieve itself of responsibility for that reason.

Merrill vs. Los Angeles Gas & Elec. Co., 158 Cal. 449-503-507.

Lininger vs. San Francisco etc., R. R. Co. 18, Cal. App. 420.

Let us briefly still further consider the matter in other aspects. It was proven that Defendant in

Error, when injured, was standing where he had a right to be, where, in fact, he had paid the company for the right to be, on the Depot grounds where alone he could take a train; he, at no time, as the verdict of the jury resolves, was a loungee or trespasser.

Under these circumstances, was he required to take any unnecessary risk of his life or did the company owe him the duty that its servants, agents, and employees would not be guilty of any negligence that might imperil or take his life?

In *Archer vs. N. Y. & N. H. Ry. Co.*, 106 N. Y. 589; 13 N. E. 318, it was held that "The passenger has the right to act upon the assumption that every necessary and reasonable precaution would be taken to make the platform safe (a platform level with the tracks as at Paso Robles), and that he had a right to regard the platform as a safe and proper place, and that to bring, without notice, a train at such a speed up to a station and into the neighborhood of incoming and outgoing passengers, and so near a platform as to sweep a portion of it, was negligent."

Mr. Justice Lamar says in *Gleeson vs. Virginia Midland Ry. Co.*, p. 443, 140 U. S. 435: "Since the decision in *Stokes vs. Saltonstall*, 13 Pet. 181, and *Railroad Co. vs. Pollard*, 22 Wall. 341, it has been settled law in this Court that the happening of an injurious accident is in passenger cases, *prima facie* evidence of negligence on the part of the carrier, and that (the passenger being himself in the exercise of due care), the burden then rests upon the carrier to show that its whole duty was performed, and

“that the injury was unavoidable by human foresight, “the rule announced in those cases has received general acceptance; and was followed at the present term in *Inland & Seaboard Coasting Co. vs. Tolson*, “139, U. S. 551.”

Did he have the same knowledge of the impending situation that caused the injury as possessed by the company? Most certainly not. He did not know until too late, what the company did know in ample time, that it had neglected to provide the necessary cars to accommodate its passengers. He did not know, in advance, what the company knew for hours, through the sale of its tickets at Atascadero, that there would be a large crowd surging for position to board three partly filled cars in a veritable cul de sac.

He did not know what the company did know, in advance and from experience, was needful to be done in the way of safeguarding the natural and spontaneous movements of so large a crowd of excursionists.

He could not as clearly comprehend as could the company, the usual action of an engineer running on a regular schedule, who was fifteen minutes behind time without run-late orders.

He could not, then, keenly appreciate the fact that a railroad company holds its engineers (properly, too), to strict accountability for loss of time, and that individual patrons of the company, cannot, as a rule, do more than idly complain.

Surely no one can, for a moment, imagine that Captain Ward either knew in advance, or had any reason to suspect that he was in a position of danger? He only knew that he was on station premises by an absolute right, that he was violating no law, that he was conscious of no duty unfulfilled; he saw no disorder among the soldiers, who simply did what they had the lawful right to do and what any large crowd always does under similar circumstances—move and surge to get a seat or place in crowded cars. “Negligence is not imputable to a person when, under the circumstances, the person sought to be charged with it, had no reason to suspect that danger was to be apprehended.”

Langan vs. St. Louis, Iron Mountain & S. R.
Co., 72, Mo. 392.

As a gentleman who had paid for his ticket, Captain Ward possessed the legal and moral right to be where he was, modestly conversing with his fellow officer, before the train arrived.

Nothing happened there whereby it was in his power to avert the accident—he had been guilty of no negligence.

He knew that there was a large crowd, but he assumed, as he had a right to assume, that the company would perform its duty, that it would provide, as the law requires, sufficient accommodations for all to whom it had sold tickets, (C. C. of Cal. 483. 2185. 2184. 2102. 481.) that it would provide safe regulations for the admittance of passengers to its trains,

that it would not run its trains under manifestly perilous conditions save with great caution at least.

Chicago Rock Island & Pac. Ry vs. Stepp. *supra*,
Pennsylvania Co. vs. Roy, 102 U. S. 451,
Railway vs. Lucas, 119 Ind. 583.

If he were wrong or guilty of contributory negligence in indulging these assumptions, no man, woman or child is ever safe in taking a train at a crowded station!

No reasonable contention can be made that it was the duty of some of the soldiers to yield their equal rights to passage upon the train to other soldiers—officers or others—because they were all upon terms of absolute equality in both law and justice—all being on an excursion off duty. But, were it otherwise, there was no violence or disorder that called for the intervention of an army officer or anyone's arrest.

What was there required was someone, representing the right and authority of the company at the station, to direct the movements of the people; as said in *Muhlhouse vs. Monongahela Street Railway Company* 201 Penn., 243, "it was not a lawless crowd, "nor was it beyond the control of a reasonable number of efficient servants or officers."

In the case just cited, the opinion proceeds as follows: "The learned judge practically told the jury "that one officer would have been sufficient to prevent the crowd from jumping on the car. Had the "crowd been kept off the car until it stopped the plaintiff would not have been injured. The failure to

“control the crowd in this respect, *aided by the rapid speed at which the car was propelled at the station, caused the boy to be thrown under, and crushed by, the wheels of the vehicle.*” Here, we have judicially defined the *proximate cause* or rather proximate causes of an injury, to which the Court added this conclusion: “The accident could have been avoided by the exercise of reasonable care on the part of the defendant corporation, and *it is therefore responsible to the plaintiff for the injuries he sustained.*” Yet in this Pennsylvania case it is stated: “As soon as it (the car) entered the gate the crowd rushed for it and according to one of the witnesses, ‘they were climbing all over it and jumping on and knocking people down and everything else’” (P. 239.) It is then observed: “As the car proceeded in the enclosure, the people hanging on it and projecting from the running board struck “Mrs. Stevens, the boy’s sister, who fell against her brother and knocked him under the car wheel, by which his left foot was so badly crushed as to require amputation. This action was brought to recover damages for the injuries sustained by the boy.” (P. 239.)

“That many people will collect at the stations on such occasions (at excursions), the corporation must anticipate, and it is obligatory on it to see that its station accommodations and means for assuring the safety of its intending passengers are commensurate to the crowd which is likely to assemble. It is the experience of everyone, and especially of those who operate street cars, that large bodies of people awaiting transportation rush on the car to secure seats immediately on its arrival at the station regardless of consequences to individuals; and this is

“true of all classes of people. This fact the corporation is presumed to know and to use proper care in controlling the crowd and guarding against the dangers arising from its probable conduct. What means shall be employed to insure the safety of persons on such occasions must be left to the corporation subject, however, when the question is raised, to the approval or disapproval of the proper legal tribunal.” P. 241.

A natural and clear word-picture of what occurred at Paso Robles was given by one of the witnesses called by Plaintiff in Error, and altogether in unison with the language just quoted, as follows: “I didn’t see anybody trying to swing on the train as the train came in before it stopped, no soldiers nor any person whatever, not a bit of disorder in that crowd at all—just like any ordinary crowd, waiting to take the train; the congestion that followed there at the time that that train arrived was like you would get on the train at the Pacific Electric today; it would be the same way; there would be a crowd trying to get on.” (R. 156.)

See also R. 157, 158.

RAPID AND DANGEROUS SPEED.

When the speed of a train may be designated as dangerous, must, in the nature of things, depend upon circumstances and conditions, in the absence of any statute or ordinance in the matter.

“It is too plain for controversy that railroads cannot be given an unrestricted discretion as to the speed at which they will run trains through station

“grounds. At such points, railroads must operate “their roads with due regard to the safety of the “public.”

Chicago, Rock Island & Pac. Ry. Co., vs Stepp,
90, C. C. A. 431.

The Court, in the Stepp case, also held that where a railroad company ran its train past a station, where another train was receiving and discharging passengers, at a rate of speed which in itself constituted negligence under the circumstances, it is liable for an injury to a person, such negligence being the proximate cause thereof, whether or not the particular injury that resulted could have been foreseen.

The evidence of several witnesses (R. 39, 50, 79, 93), is that the speed of the train, as it entered Paso Robles Station, was between twenty and twenty-five miles per hour, and there was conflicting evidence introduced by Plaintiff in Error.

Such conflict, we understand as law, was conclusively determined by the jury.

Bosqui vs. Sutro R. R. Co., 131 Cal. 390.

Bilton vs. Southern Pacific Co., 148 Cal. pp. 447-448.

As was stated by the Supreme Court of California, in Burr vs. United Railroads, 163 Cal., p. 666, “In the absence of an ordinance limiting the rate of speed at which cars may travel, no particular rate may be said to be negligent *per se*. But in any case,

the circumstances may be such as to authorize the jury to determine that, under the circumstances shown, the speed was excessive.”

See *Haley vs. Mo. Pac. R. R. Co.*, 93 S. W. 1120.

Some of the witnesses on both sides were probably as expert upon the subject of the speed of cars as may be found anywhere, particularly the Army Officers and the Engineer.

As stated by Captain Ward: “As a military man I am familiar with the vehicles of transportation. That is a most important element of instruction in connection with the army. We are trained in that in the very beginning.” (R. 93).

Yet the evidence, given by passengers and bystanders, is none the less admissible and, where experts may not be disinterested, sometimes more valuable.

Johansen vs. Oakland S. L. & H. E. Ry., 127 Cal., pp. 610-611.

Harvey vs. Louisiana, Western R. Co., 38, So. Rep. 859.

In the case at bar, four army officers estimated the speed at the rate of twenty or twenty-five miles an hour.

The complaint (R. 7-8), in addition to alleging negligence in the failure to furnish accommodation and failure to take any action to maintain order in the crowd upon its station premises, also alleged that

“said defendant, with such knowledge aforesaid, “carelessly, negligently and recklessly ran its said “train into said station of Paso Robles, at a rapid “and dangerous rate of speed, to-wit, at about twenty “miles per hour.” Then there follow specific allegations (R. 8-9), of the manner in which the injury occurred, to and including the instant “the wheels of defendant’s said train of cars ran over and crushed the right leg of plaintiff.”

In the case of Muhlhouse vs. Monongahela Street Railway Company, 201 Penn, 237, the action is on page 240 thus stated: “The Plaintiff claims that “his injuries were caused by the negligence of the “defendant in the management and control of its passenger station, and in causing and permitting the “same to be overcrowded in the operation and management of its car, and in permitting and causing “the running board thereof to be overcrowded, and in “the operation and running of its car by recklessly “and negligently running such overcrowded car into “and through such overcrowded station at an improper and excessive rate of speed.

These allegations of negligence were denied, and the averment made by the defendant corporation that “the injury resulted not from anything it had “done, but simply because of the rudeness and negligence of certain persons in attempting to get on “the car before it came to a stop.” P. 240. (Such “was the real defense to which the Southern Pacific Company directed its main evidence, for what it was worth, in the case at bar. (R. 112-120).

After a lengthy and most logical opinion, the Court, in the Muhlhouse case, set at naught the con-

tention of the corporation and clearly pointed out the *proximate cause* of the injury in these words:

“Had the crowd been kept off the car until it stopped, the plaintiff would not have been injured. The *“failure to control the crowd in this respect, aided by the rapid speed at which the car was propelled at the station, caused the boy to be thrown under, and crushed by the wheels of the vehicle.”* P. 243.

In the case at bar, no one got on the car before it stopped, though some of the witnesses for Plaintiff in Error testified that some persons tried to board it, but no one claims that Captain Ward tried to board, and his own testimony and of all who claim to have seen him at the immediate time of the accident is that he tried to get away from the train. (R. 94.)

In the case at bar, we might paraphrase the above statement of the *proximate cause* of the injury as follows: “The failure to provide accommodation in the requisite number of cars for so large a crowd as was gathered with lawful right of expectation of obtaining their prepaid passage, their immediate disappointment of that expectation when the train came in, the condition and lack of all management of the station premises, and the failure to control the crowd, moving and surging forward by a common and natural impulse, ‘true of all classes of people,’ aided by the rapid speed, under the circumstances, at which the train was propelled at the station—caused Captain Ward to be thrown under, and his leg crushed by the wheels of the train.”

RECKLESS SPEED.

Even where no crowd is congregated, the Supreme Court of California, has held that the lower "Court "was not warranted in saying as a matter of law that "thirty miles an hour was not a reckless rate of speed "for a train to make within boundaries of a city of "the sixth class.

Cooper vs. Los Angeles, etc., Ry. Co., 137 Cal.,
229-232.

The Supreme Court also declared in the case last cited that "whether the rate of speed was reckless "as well as dangerous was for the jury to determine "from all the evidence."

In Bassett vs. Los Angeles Traction Co., 65 Pacific Reporter, 470, the same Supreme Court says: "The "conclusion of the court is contested by appellant's "counsel and it is argued in effect that the evidence "is insufficient to show that the rate of speed at the "time of the accident was excessive. But whether "they are right in this need not be considered. *It is "sufficient that the evidence fails to show the con- "trary.* The rule established in this State is that " "when it is shown that the injury to the passenger " "was caused by the act of the carrier in operating " "the instrumentalities employed in his business, " "there is a presumption of negligence, which throws " "upon the carrier the burden of showing that the " "injury was sustained without any negligence upon " "his part.' *McCurrie vs. Southern Pacific Co., 122 "Cal., 561, 55, Pac. 324, and authorities there cited.* "These authorities also dispose of the contention of

“the appellant that the evidence was insufficient to “show that the excessive rate of speed or other negligence of defendant was the proximate cause of the “plaintiff’s injury. It is sufficient that it did not “show the contrary.” Such, we understand, is also the Federal Doctrine.

Gleeson vs. Virginia Midland Ry. Co., 140, U. S. 435.

ASSIGNMENTS OF ERROR.

In twenty-four instances among the exceptions taken to the admission of evidence, out of a total of thirty-six, by the Plaintiff in Error, only the mere general objection was made that the evidence was “incompetent, irrelevant and immaterial.”

This, we understand, is “too general to be considered on error, if in any possible circumstance it could be deemed or could be made relevant, material or competent.”

Sparf & Hansen vs. United States, 156, U. S. 56-7.

Mine & Smelter Supply Co. vs. Parke & Lacy Co., 107 Fed. Rep. 884, before C. C. Judge Caldwell, and he cites Tooley & Bacon, 70 N. Y. 34, 37; Comstock vs. Smith, 23 Me. 202; Bowers vs. Block, 129 Ill. 424.

We shall, nevertheless, reply to the Assignments seriatim.

Beginning with Assignment I., the evidence was offered for the purpose of showing that the number of persons who required transportation at Atascadero, near Paso Robles Hot Springs, "during the months of September and October, 1910, and to and from Paso Robles Station, was vastly augmented; and such proof was preliminary to proving, by advertisements and the sale of Excursion tickets by the Southern Pacific Company, to these men, that such Railroad Company had actual notice and knowledge as alleged in the Complaint, of the size of the crowd and the deplorable and dangerous conditions that existed at Paso Robles Station when the injury of the Defendant in Error was sustained. (R. 7-8).

Assignments II, III, IV, and V, come within the category just stated, save that the objections under Assignments II, and III, that the paper was "the best evidence," etc, were not well taken for the reason that the record shows the fact that "the paper" or Exhibits objected to were simultaneously admitted in evidence and the oral evidence was simply for identification. (R. 33-36.)

Assignment VI was based upon a mere general objection that the evidence was "irrelevant and immaterial," and the Court ruled that the witness could "state what the conditions were of the train." (R. 42.)

The answer (R. 43), of the witness, disclosed what Defendant in Error had alleged that "said defendant "could in fact accommodate only a small number of

“said crowd with transportation, and while said “crowd *immediately upon catching sight of said “train*, was moving and surging to obtain and secure the small accommodation that then existed “upon said train, and while defendant neglected and “failed to take any action for the purpose of maintaining order in said crowd upon its premises at “said station of Paso Robles, said defendant, with “such *knowledge aforesaid*, carelessly, negligently, “and recklessly ran its said train into said station of “Paso Robles at a rapid and dangerous rate of speed, “to-wit, at about twenty miles per hour,”etc. (R. 8-9.)

Another witness afterward testified that he “could see” from where he was standing that there was no use trying to get upon one of the lighted coaches. (R. 73, see 72.)

The evidence, showing what were the conditions of the train, when it arrived at Paso Robles, clearly and powerfully illustrated a negligence, concurring with other negligences, to the production of the injury.

Lack of accommodation, especially when *the limited number* of lighted and available coaches could be *immediately seen* by the crowd from where it was standing, unquestionably caused the crowd to move, surge, and congest more rapidly and dangerously than it otherwise would have been. Muhlhouse vs. Monongahela Street Ry. Co., *supra*.

“Consequences which follow in unbroken sequence “without an intervening efficient cause from the “original negligent act, are natural and proximate;

“and for such consequence, the original wrongdoer is “responsible, even though he could not have foreseen “the particular results which did follow.”

Christianson vs. Chicago, St. Paul, M. & O. Ry.
Co., 69, N. W. Rep. 649. and authorities
cited.

Assignment VII, as shown by the Bill, has no other foundation than these words: “MR. GORTNER—Move to strike it all out as irrelevant and immaterial.” (R. 43.)

The reply to it is quite naturally identical with that just made to the preceding Assignment. But, it may be added that “the rule is universal that nothing which occurred in the progress of the trial can be assigned for error here unless it was brought to the attention of the court below, and passed upon directly or indirectly.”

Wood vs. Weimer, 104 U. S. 795.

Assignment VIII does not, we say it with respect to counsel, give the “full substance” of the question and answer. Immediately before the question there are these words: “had a round-trip ticket.” (No objection on the ground that the question was leading was interposed.) Immediately after the answer is this expression: “*That* is a ticket like the one I had.” (R. 48, 49.)

The “excursion ticket,” concerning which this question was propounded, was identified by various witnesses and introduced in evidence. (R. 88.)

Assignment IX., generally objected to only, (R. 61) was material as evidence of the ability of the Engineer and Fireman to see at a distance the size of the crowd, and in the language of the Engineer—to “always use care where there is a crowd.” (R. 139.)

Assignment X. falls within the same reason given last above, and the answer of the witness—that an Engineer could see “a good four hundred yards” (R. 62) was less favorable to Defendant in Error than the evidence of Engineer Coburn on cross-examination that the electric light on the engine that night “will light up half a mile, at least a good light for a half a mile” (R 137). The Engineer admitted that he could see clear down to the station after rounding the curve which was 1800-2000 feet (R. 135); that when he “looked out of the cab he saw a big crowd around there.” (R. 137, 138.) There was thus brought home to the Corporation’s engineer actual and direct timely knowledge of the existence of the “big crowd,” and whether its engineer “used care” in running into the station was for the jury to decide from all the evidence.

Southern Ry Co. vs. Bailey 67, S. E. 365.

Chicago, Rock Island & Pac. Ry. Co., vs. Stepp,
90 C. C. A., 431.

Burr vs. United Railroads, 163, Cal., 666.

Elliott vs. N. Y., N. H. & H. R. R. Co., 80, Atlantic, 283.

Brooks vs. Munsie Traction Co., 95 N. E. 1006.

Austin et ux vs. Wash. Water Power Co., 68 Wash., 508.

Gatta vs. Phila. B. & W. Ry. Co., 80, Atlantic, 617.

Muhlhouse vs. Monongahela St. Ry. Co., 201, Pa. 237.

Harmon vs. Flintham, 196, Fed. Rep., 635.

Cousineau vs. Muskegon Traction etc., Co., 145, Mich., 314.

The three last cited cases cover many points in close analogy to the case at bar, and we most earnestly solicit the attention of this Court to the principles therein laid down.

Assignment XI "objected to as irrelevant and immaterial" (R. 63) is not well taken. The evidence was admissible for the purpose of showing that the neglect of the company to furnish enough cars to properly and reasonably accommodate the "big crowd" was, beyond question, an inspiring motive for the crowd to rush and surge as it did. The cases of Penn. Ry. Co. vs. Stockton, 184, Fed. 422; Taylor vs. Penn Co., 50, Fed. 755; I. C. R. R. Co. vs. Treat, 179, Ill. 577, 579, 54, N. E. 290; Harmon vs. Flintham, 196 Fed. Rep. (Aug. 8th, 1912) 635; Muhlhouse vs. Monongahela Street Railway Co., 201, Penn. 237; and of Cousineau vs. Muskegon Traction etc., Co., 145, Mich., 314 and many other authorities heretofore cited—all hold the doctrine that in the operation

of its instrumentalities, “carriers of passengers are “bound to exercise the utmost care in maintaining “order and guarding those they transport against “violence from whatever source arising, which might “be reasonably anticipated or naturally expected to “occur. The general rule is clear that from what- “ever source the danger may arise, if it be known or “should have been known, care must be exercised to “protect the passenger from that danger.”

Counsel contend (Brief pp. 4-5) that “another (train) was scheduled to go through (Paso Robles) in the same direction at 11:16, being train 20, and than that the crowd had accumulated at the depot and its vicinity, etc.” nothing appears to show its purpose “as to whether it intended to take the ‘Sunset Express’—the harmful train—or the later train due in thirty minutes.”

Upon this assumed problematic question, Counsel build much argument all through their Brief.

But Counsel have assumed erroneous premises for inevitably incorrect deductions in the matter.

The only hint in the Record their way is contained in “Plaintiff’s Exhibit No. 3 (R. 34-35) where it appears that the “later train”—No.20—was scheduled as a train that might be flagged at Atascadero at 1:33 P. M. This Schedule proves that the Company *advertised* several weeks before that Train No. 20 would stop upon a flag at Atascadero, but it does not prove that the Company did, in fact, *run* such train on October 8th, 1910.

Against the said assumption of Counsel in this matter is the positive testimony of Captain Ward "that only one train went south after the special had "taken the crowd up for this swimming event up to "Paso Robles. That was the Sunset Limited, due at "10:45." (R. 88.) This evidence is nowhere contradicted by anyone or anything. Counsel also say: "It is to be remembered that the railroad company "had no way of knowing how many of these people "assembled at the depot, were there for the purpose "of going back to Atascadero that night. There is "no evidence that any notice was given the Company, "except by their presence. Their tickets were good "for still another day." (Brief p. 42.)

This statement begs the question in more ways than one, when we recall the fact that there were at least one thousand and one of these excursion tickets sold for the "swimming event" at Paso Robles Hot Springs—Captain Ward having purchased the "1001" (R. 89); that all these military men had, as the Company had previously advertised, their "Camp" at Atascadero, where they ate and slept—that the Hot Springs were a resort that no one expected the mass of the soldiers to remain in overnight. Moreover, "their presence" at the station late at night, tickets having been sold them during the day at Atascadero, was, in common-sense, notice that the soldiers and officers had come to and were waiting at the station for passage upon the first and last train they could get.

If it were, indeed, true, which it was not, that the company intended to run a "later train" that night,

all the more was it the duty of the Company, through its agent there, to whom the situation was open in abundant time, to take some appropriate action either to divide, police or otherwise safeguard the crowd.

This, surely, is so under the reasoning of all the apt authorities. As said in *Hansen vs. North Jersey St. Ry. Co.*, 46, Atl. Rep. 718-722: “Reasonable foresight should anticipate the possibility of danger, and due caution should provide against it. The defendant was, therefore, bound specifically to use a high degree of care to protect the plaintiff—not, indeed, from crowding, per se, but from danger likely to arise from crowding. Considerations of public policy strengthen this conclusion. If common carriers are to be allowed to cram their cars with passengers, to their own profit and the discomfort of the public, they should be held all the more to a strict and active responsibility to use due care to secure entrances and exits. Otherwise, the obligation of plain duty will be weakened by embarrassments of their own creation. It is important to consider in every such case, whether the danger to the passenger was one that the common carrier should have foreseen. The inconveniences and risks incident to the discharge of passengers from a crowded surface car are notorious. The history of every day illustrates them. The Court of Appeals of New York in the case of *Lehr vs. R. R. Co.*, 118, N. Y. 556, which was apparently a stronger case than this, thus expresses itself: ‘It clearly appears that the defendant undertook to carry more passengers than could sit or stand within the car, and that both platform and steps were filled to

“ ‘their utmost capacity. The action of persons so
“ ‘crowded together, and the great force which they
“ ‘exercise, sometimes almost unconsciously, on each
“ ‘other is understood by carriers of passengers and
“ ‘their employees; and the Court would not have
“ ‘been justified in non-suiting the plaintiff, and hold-
“ ‘ing as a matter of law, that the exercise of reason-
“ ‘able foresight would not lead the defendant to
“ ‘anticipate that overcrowding the car and its plat-
“ ‘forms might render the accidents like the one which
“ ‘befell the plaintiff probable.’ ”

“Common carriers are, from the exigencies of
“their business, peculiarly familiar with these diffi-
“culties and risks, and adopt regulations for dealing
“with them.”

Now, in the case at bar, the answer of the witness
to the challenged question was as follows: “The
“train was crowded; I went through about three
“cars; they were all in the same crowded condition.”
(R. 63.)

In this connection, it must be kept in mind that by
the admission of the Engineer who made up the train
(R. 137) and the testimony of another of the witness-
es of the Railroad Company (R. 157-158) there were
only three partially available cars for passengers
when the train arrived at Paso Robles; that, accord-
ing to still another witness, speaking of the cars,
twenty-five minutes later, “there were men sitting
“on the sides of the seats, standing in between *the*
“*people that had occupied the train before it arrived*
“*at Paso Robles*, standing in back of them and in
“front of them; (R. 43) that the crowd could instant-
ly perceive, when the train came in, that only three

cars out of the whole train were even lighted for their accommodation; and that the crowd could likewise see from where it was “standing” the interior of the three lighted coaches. (R. 73.) and they knew full well they had no right save upon these three coaches. Counsel for plaintiff strenuously attempt to show that there was no connection between these facts and the action of the crowd. But the sane mind, virtuous or vicious, acts from and because of some inspiring idea or motive, even where such action is hardly distinguishable from mere instinct. And whether the action of the crowd was simply instinctive or, upon careless and brief reflection, it was altogether natural, under the circumstances, and provocative of danger and violence “which might reasonably be anticipated or naturally expected to occur,” when the waiting and impatient crowd, late at night, discovered at a glance that the tardy train could not properly accommodate its members.

Lack of accommodation, even more than failure to exercise some reasonable guardianship at the station premises, directly contributed to the swift congestion of the crowd toward and in the “narrow space” where it seemed the crowd could only board the train. (R. 158.)

Surely, it was competent to show the facts that thus bore so potently upon the animus and action of the crowd, in order that the jury might know all the agencies and causes that combined and conspired to produce the injury.

Proof of the crowded condition of the cars, *as they left Paso Robles*, unquestionably made clear to the jury that the Railroad Company, by reason of its failure to provide enough cars to accommodate both those already on and those waiting to get on the train created a strong incentive for the crowd, that instantly perceived the situation, to rush as it did, as the train was coming into Paso Robles.

It will not answer to say with counsel for Plaintiff in Error: "If the crowded condition of the train was "proper to be proved as a circumstance, and not as an "act of negligence bearing on the accident, then the "evidence should have been left to the jury without "instructions as to any violation or compliance with "law in respect thereto. (Plaintiff's Brief, P. 42).

(Here we note that Plaintiff in Error tendered no instruction upon this point; also, that "all the instructions given by the Court were asked for by the "jury, were reduced to writing, and *by consent* of "both counsel taken by the jury to the jury-room, "etc." (R. 203).

We may add under this discussion the self-evident propositions; that if the company had properly guarded its station premises "to safeguard such a "surging throng of people, selfishly intent, *as experience shows such a crowd is*, to board the cars and "get seats and apt to move forward *by common impulse* as a train, and especially a late one, approaching, "es," the lack of accommodation upon the train, might have been of little or no importance, and, conversely, that if the company had furnished sufficient

cars for the proper accommodation of the crowd, and such fact had been known or easily seen by the crowd, the rush would, no doubt, have been inconsequential, or at worst, greatly lessened in danger.

The two negligencies (neglect to accommodate and neglect to guard the station premises) dove-tailed together. Had the company been guilty of only one of these negligencies, there would have been less danger of the accident. When negligent and reckless speed also concurred with these two, the responsibility for the injury is clear.

If this reasoning be correct, the evidence quoted was relevant and material, and instructions in harmony therewith indubitably proper. That the Conductor, as well as the Engineer, was cognizant of the situation in time to have averted the accident is indicated by the rather reluctant testimony of the former as follows: "I was standing there and I could see by the headlight and by the light of the platform that there was quite a crowd of people there *getting ready to get on as soon as they could, to get seats, as they always do when there is a crowd. I seen them squaring around and getting ready to get on the train.*" (R. 133.)

We thus have the natural action of the crowd stated by an experienced railroad man—that is, that the crowd strives to get seats—accommodation in fine; this is the supremely important element in their minds, the thing for which they wait at stations and for which they pay. How absurd to contend,

then, that failure to furnish proper accommodation, admittedly a violation of law, had no bearing upon the accident.

As said in the case of *Muhlhouse vs. Monongahela St. Ry. Co.*, 201 Penn. 241: "It is the experience of 'everyone, * * * * that large bodies of people await-
'ing transportation rush on the car to secure seats
'immediately on its arrival at the station regardless
'of consequences to individuals; and this is true of
'all classes of people. This fact the corporation is
'presumed to know and to use proper care in control-
'ling the crowd and guarding against the dangers
'arising from its probable conduct."

The heavily crowded condition of the train, shown by Captain Light's testimony, both when it arrived at, and when it left Paso Robles twenty-five minutes later, certainly tended to explain the rush of the crowd "to get seats." Of course, the crowd was much larger inside the cars when the train left Paso Robles; but it must be remembered that all were passengers—both those who were on board before the train arrived and those not on board until the train left Paso Robles—that the same company owed to them all its protection—and that part of that protection was proper accommodation on its cars and proper care at its stations—and that if any failure in either direction actively contributed to the injury, the company is responsible.

Evidence of any fact bearing upon and sustaining these principles whether it was of a condition that existed before or after the injury was equally proper.

With the statement of counsel for Plaintiff in Error that “this over-crowding was doubtless a violation of the law” (Plaintiff’s Brief, p. 36), we most cordially agree; and we believe that the Record and foregoing analysis of the authorities cited demonstrate the clear relation such over-crowding sustained to the injury.

Assignment XII is not argued by opposing counsel; but we, nevertheless, cite authorities to show that there was no error committed by the Court in allowing the witness to testify as to speed.

Bosqui vs. Sutro R. R. Co., 131 Cal., 393.

Johnsen vs. Oakland, etc., Ry. Co., 127 Cal.,
608-611.

Harvey vs. Louisiana Western Ry. Co., 38 So.,
Rep. 859.

Assignment XIII, objection that question was “immaterial” only, presents the identical matter discussed under Assignment XII.

Assignment XIV, and Assignment XV, likewise present the general legal phase offered by Assignment XI.

As counsel state, there was no disorder before the train arrived—that seems to be agreed; but it certainly does not follow that, hence, there was no reason or necessity for safeguarding the crowd against the time and natural temptation toward disorder *when* the train did arrive or was arriving.

All the authorities, that we have seen in counsel's Brief, and those herein cited, seem to us to hold that the crowd at Paso Robles was, in the language of *Muhlhouse vs. Monongahela St. Ry. Co.*, 201 Penn. 243, "not a lawless crowd, nor was it beyond the control of a reasonable number of efficient servants or "officers."

And in reviewing these two Assignments, we think that the fact that the company had advertised the presence of the Military men, that it had sold excursion tickets, 1001 in number (R. 89), between the sections thus advertised—do not warrant learned counsel in contending that the company was without notice or knowledge of the requirements of the law that it must, upon reasonable notice, accommodate and "do everything necessary for their safe carriage and safe entrance into the company's carriages."

That the company was thus absolutely bound, and that its protection was due to its passengers standing in order awaiting its train upon its premises is held the law in the following cases:

Taylor vs. Penn. Co., 50 Fed., 755-759.

Cannon vs. Midland Gt. W. Ry. Co., 6 Irish Rep. (1880-1881), 199, 208.

Cousineau vs. Traction & Lighting Co., 145 Mich., 314, 318.

I. C. R. R. Co. vs. Treat, 179 Ill., 577, 579.

Young vs. New York, etc., Ry., 171 Mass., 34, 35.

Ditmar vs. Brooklyn Heights R. Co., 91 App.
Div. 378, 86 N. Y. Supp. 878, 879.

Graham vs. Manhattan R. Co., 149 N. Y. 336,
341.

And particularly in the cases cited of—Harmon
vs. Flintham 196 Fed Rep. (p. p. 635-640)
Penn. Ry. vs. Stockton, *supra*, and Muhl-
hause vs. Monongahela, *supra*.

Perhaps, the common-sense answer of Lieutenant
Anderson was good law, when asked “why was there
something that would call upon a railroad company
to police when officers present didn’t do any polic-
ing;” he replied: “I am merely a layman, as you
“understand, and I give this as opinion; but it seems
“to me that if a corporation or railroad knows there
“is going to be such a crowd, with intent and frenzy
“to get on a train, and their forgetfulness of others,
“*as all people are under such circumstances*, it would
“be up to that corporation to look out for the crowd.”
(R. 56). Brusquely, it might have been added:
“That is a part of what they are paid for.” Un-
questionably, the cases uphold the opinion of the
“layman,” just quoted.

Distinctly, aye emphatically, it was the duty and
business of the railroad company “to look out for the
crowd” upon its own station premises, in every rea-
sonable sense—whereby the selfishness or naturally
spontaneous movements of the crowd might produce
or cause to be produced “from any source whatever,”
any injury that the superior experience of the cor-
poration could anticipate. The nearly fatal injury,

suffered by Captain Ward—one that destroyed the career of a brave and extraordinary man—could reasonably have been anticipated as a very possible happening to some of the members of that crowd—as the numerous accidents of record prove, and as the enclosure of station premises and their frequent policing also demonstrate.

The railroad's own printed record (R. 33-36), shows that it had knowledge of the necessity for increased transportation and increased caution in conducting that transportation at the stations of Paso Robles and Atascadero, and that such knowledge had existed at least since the beginning of the month of September, to October 8th—when during the daytime it sold tickets to the crowd at Atascadero. It was not the business or duty of the crowd to supply either officers, accommodation, or knowledge of the movements and operation of the company's trains; it was not the province, right, or duty of any member of the crowd to presume to regulate the order of the admission of that crowd to the train. The fact that a large part of the crowd was composed of soldiers, off duty on an excursion, did not affect the principle. The Defendant in Error stated the Military law in answer to the questions of opposing counsel, as follows:

“I don't think, if I had anticipated any lack of control in that crowd of soldiers, I could have assumed command of them, and held them in line, because the officers in the army are especially cautioned not to

infringe on the rights of soldiers beneath their rank; and in a case like this, a soldier, not being on duty, has the rights of any other citizen, and any officer that undertook to marshal soldiers so that he would have the precedence to get through the crowd, would be subject to trial by court-martial and be dismissed from the army. I could not, on anticipation that they might hurt themselves, have caused them to stand at attention, or appointed a provost guard to hold them in line. It would have been distinctly an infringement on their rights. If I had *seen* anything to indicate a necessity of policing that crowd myself, or any citizen or officer, I should judge, could undertake to do such a matter.” R. 101). No officer had charge of the train or the station, no officer had any power to order the soldiers to take or not to take the train, nor could an officer, as hereinbefore shown, know in advance what the company knew—the dangerous situation, until it was too late for remedy. No officer could know that the train, when it came in sight, would be seen to be insufficient to accommodate the crowd. No officer could know in advance at what speed the train would be run into the station. No officer could know in advance that the train would be so lighted in front or unlighted elsewhere that it would seem to the crowd that the only place it could board the train was in “the narrow space” between the freight-cars and the incoming cars.

Counsel are right that it was too late for the officers to take any steps as the train passed into the station, and that the officers had previously observed "no disorder;" but counsel are not right in assuming that these facts exonerate their client. For, the duty and obligation of their client as a carrier were widely and radically unlike the duty and obligation of the officers and other passengers assembled at the station.

"The carrier must employ sufficient servants for the protection of its passengers."

Kuhlen vs. Boston, etc., Ry. Co., 191, Mass. 341.

In Putnam vs. Broadway R. R. Co., 55 N. Y. 113, it was held that a railroad company is bound to exercise the utmost vigilance not only in guarding its passengers against careless interference by others, but even against violence; and if, in consequence of this neglect, the passenger receive an injury, which in view of all the circumstances might have been reasonably anticipated, the carrier is liable. "The police power of railroads extends over persons employed by it and over all who come upon their premises in so far as may be necessary to prevent injury to those for whose safety the carriers are bound to provide."

Stewart vs. B. & C. T. R. R. Co., 90 N. Y. 588.

"The courts must take notice of that which is matter of common knowledge and experience"; that is, in the actions of crowds at stations awaiting transportation.

Gaynor vs. Old Colony & N. Ry. Co., 100 Mass.,
97 Amer. Dec. 96.

Assignment XVI is not argued, and we may pass it with the statement that the question called simply for a fact, which the witness knew or did not know, and concerning which the jury could only be advised by testimony.

Assignment XVII is not insisted upon in the argument of Plaintiff in Error, but lest it should be overlooked by Defendant in Error, upon oral argument by opposing counsel, we wish to cite the following from the case of *Johnsen vs. Oakland, Etc., Ry.*, 127 Cal., 611 “The law recognizes a very broad and “liberal rule in the reception of opinion evidence of “non-experts as to the rate of speed cars may be “traveling.”

To the same effect are: *Thomas vs. Chicago, etc., Ry. Co.*, 86 Mich. 496; *Walsh vs. Mo. Pac. Ry. Co.*, 102 Mo. 582, and *Ward vs. Chicago St., etc., Ry. Co.*, 85 Wis. 601.

Besides it elsewhere appears fairly that the witness here is an expert. (R. 93).

Assignments XVIII and XIX, involve the question already discussed under Assignments XIV and XV.

We add to that discussion, however, the exhaustive opinion and citations contained in the case of *Kuhlen vs. Boston & Northern St. Ry. Co.*, 193 Mass. 341 (1907).

“It is the duty of a carrier of passengers to select “and employ a sufficient number of competent servants to meet any exigency which, in the exercise of

“the high degree of care and diligence towards its
“passengers to which such a carrier is held, it rea-
“sonably ought to have anticipated.”

Dodge vs. Bangor, etc., Co., 148 Mass 207.

Bryant vs. Rich, 106 Mass. 180.

Commonwealth vs. Coburn, 132 Mass. 555.

Treat vs. Boston & L. Ry. Co., 131 Mass. 371.

“It was a question for a jury whether * * * the
“high degree of care it was bound to exercise towards
“its passengers did not require as a reasonable pre-
“caution *the employment of an increased number of*
“*men to prevent such jostling and crowding at the*
“*entrance of the cars as involved danger to passen-*
“*gers.*”

“And it is its duty to use all proper means and
“precautions to protect its passengers from injury
“caused by the misconduct of other passengers, such
“as under the circumstances, might have been antici-
“pated and could have been guarded against, and is
“no less stringent than the obligation to prevent mis-
“conduct or negligence on the part of its own ser-
“vants.”

Simmons vs. New Bedford, etc. Co., 97 Mass.
361;

Nichols vs. Lyman, 168 Mass. 528;

Muhlhouse vs. Monongahela, etc. Ry., 201 Penn.
237;

Pittsburg & C. Ry. vs. Pillow, 76 Penn. Sta. 510;

McGearty vs. Manhattan Ry., 15 App. Div.
N. Y. 2;

Pittsburg vs. Hinds, 53 Penn. 512;

Flint vs. Norwichee & N. Y. Ry. Co., 34 Conn.
554, 6 Blatch, 158; 7 Blatch, 536; 13 Wall.
3;

New O., St. L. & C. Rd. vs. Burke, 53 Miss. 200.

In Brackett et al. vs. So. R. Co., 70, S. E. 1026, the Court, after considering some cases requiring mere ordinary care at a station, thus proceeds: "But "we think the weight of reason and authority sustains the rule adopted by the court in Holcombe vs. "Southern Ry. Co., 44 S. E. 68, that the burden of "extraordinary care is on the carrier in the management of its stations, as well as in the operation of "its cars. The authorities on both sides are collated "in 4 Elliott on Railroads, Sec. 1590, Fetter on Carriers, Vol. I, p. 98, and Fremont, etc. Ry. vs. Hagedorn, 72 Neb. 773, 101 N. W. 1033, 196 N. W. 1041, "4 L. R. A. (NS) 254, Gaynor vs. Old Colony N. R. Co., 100 Mass. 208, Grand Rapids & I. R. Co. vs. "Martin, 41 Mich. 667, Knight vs. Portland S. & R. "R. Co., 56 Me. 234, Warren vs. Fitchburg R. Co., "85 Am. Dec. 700, Webster vs. Fitchburg R. Co., 161 "Mass, 298, Dodge vs. Boston & B. S. S. Co., 148 "Mass. 207, Weston vs. N. Y. Elv. Ry. Co., 73 N. Y. "595, Norfolk & W. Ry. Co. vs. Galliher, 89 Va. 639, "Burke vs. Chicago & N. W. R. Co., 108 Ill. App. "565, Krantz vs. Rio G. W. R. Co., 12 Utah 104, "Johns vs. Charlotte C. & A. R. Co., 39 S. C. 162, "20 L. R. A. 520."

Assignment XX involves no error. No specific objection was made to the question, "State just generally, without any details, through how many actual engagements of war you have passed?" And the answer of Defendant in Error was both relevant and material, for the reason that it was competent and only simple justice, that the jury, in estimating the mental suffering (there can be strictly no suffering save it strike the mind), and loss of the military career of Captain Ward, should have been given some general knowledge of his career. (R. 85-86.)

Captain Ward sued for damages for the loss of his career in the army as well as for the mere physical injury. See paragraph II, of the Complaint (R. 5).

In paragraph XII, it is alleged: "That by reason "of said injury the plaintiff will be permanently re-tired from the said army and will utterly lose the "career which he has chosen in life, together with all "the rights, salaries, emoluments, and promotion in "rank and honor to which plaintiff was eligible prior "to said injury." (R. 10).

Neither of these allegations is denied in the company's Answer.

Now "salaries and emoluments" in our Army are *fixed* and *certain* by acts of Congress, but these are not all that compose an officer's career, and their loss is not all nor by any means the greater source of suffering he endures, when an injury closes his career as a military man.

That Captain Ward had gone through “fifty-seven” actual engagements of war in the service of his country at the age of thirty-five years was a matter for just pride in his mind and heart, and in the esteem of those who knew or cherished love or friendship for him.

Can there be any doubt that such a triumph, so early in life, when cut suddenly down from all future fruition, was the source of keenest anguish?

Can it be questioned that the unexpected and irretrievable ruin of the main purpose of one’s life is a clear cause for most poignant mental suffering?

As Mr. Justice Henshaw in *Merrill vs. Los Angeles Gas & Elec. Co.*, 158, Cal. p, 513, in discussing the manifold quality of human pain, said: “Shall a jury ‘be not permitted to consider these matters in estimating mental suffering, and is it an answer to say ‘that they are too remote or ‘too delicate to be “‘weighed by any scales which the law has yet invented?’ They are not remote. They are direct “and consequential. They differ in degree with individuals, with their sex, circumstances, and positions “in life. But so do men differ in sensing physical “pain; so do they differ in the mental suffering occasioned by physical pain alone. No one would pretend to say that the actual physical suffering of a “crushed leg is the same in case of a sodden, phlegmatic tramp as it would be with a high-strung, “nervous active man of affairs. Yet the law has “scales by which it measures the compensation for “suffering of this kind, and measures it, of course,

“in terms of money. Why should it be supposed that “those scales will break down and prove inadequate “when other legitimate elements of mental suffering “are cast into their balance? In truth the admeasurement of suffering in terms of money is a most “clumsy device, but it is the best device the law will “employ until some better is discovered. To forbid “the consideration of these other elements of mental “suffering, because the scales are not sufficiently delicate for their weighing, is equally to condemn the “use of the scales in the very cases and for the very “purposes now admittedly sanctioned by the law.”

“We think, therefore, that *mental worry, distress, grief, mortification*, where they are shown to exist, “are properly component elements of that mental suffering for which the law entitles the injured party to “redress in monetary damages.”

Were one of the honored members of this bench so injured as to be forever foreclosed to sit here, and brought suit for the redress of his illegal injury; would it be too much to say that his mental suffering might be understood and more justly compensated, to the extent that compensation were possible, if evidence were adduced of his labors and attainments before the jury that would otherwise decide in darkness? Would Edison's life and work weigh nothing more than the vagabond, were each suing for the loss of both arms?

We do not understand that such barbaric indifference to justice or rather cold-blooded refinement of sophistry as is involved in a negative reply to the

query just propounded has ever had judicial sanction.

As said in the case of Zibbell vs. Southern Pacific Co., 160 Cal., on page 254: "The principal elements "of damage for which compensation may be awarded "are the physical and mental suffering caused and "which will be caused by the injury, and the partial "or total impairment of earning capacity likewise "caused by the injury." This is also deemed the law by the highest court.

Vicksburg & Meridian Rd. Co. vs. Putnam, 118 U. S., 545.

Assignment XXI, in any view, presents no injurious error, but it was not error to merely bring before the jury what really was admitted in the Answer.

Assignment XXII shows no error. It was competent and proper to prove that the Railroad Company took actual notice of the necessity for its increased transportation in at least one selfish particular by employing an extra agent during the encampment. The evidence also reveals that the Company made provision for the protection of its own interests, although it failed to make at Paso Robles provision for the protection of the persons who paid their money to travel and patronize its advertised resort.

Assignment XXIII and XXIV and XXV all relate to the movements of the trains from Atascadero to Paso Robles and from Paso Robles to Atascadero on October 8th, 1910; and the questions and answers

were pertinent to show how the situation arose that culminated in the injury, as well as to show the alleged negligence of the Company. The objections were purely general, and are only argued in connection with the contention that there was a "later train" from Paso Robles than the one by which Captain Ward was run over.

Assignments XXVI and XXVII appear to be abandoned for obvious reasons.

Assignments XXVIII and XXIX have hereinbefore been argued.

Assignment XXX is not argued by Counsel. It concerned the exhibition of the artificial limb, on and unremoved from the injured leg of Captain Ward. The answer shows that such artificial limb admits of motion one way, but not of motion another way, indicated and illustrated before the jury.

In *Pittsburg, etc., Ry. Co. vs. Lightheiser*, 78 N. E. Rep. 1033, the Court say: "It was not error for the Court to permit the plaintiff to exhibit his injured foot to the jury, and to testify that it was stiff at the ankle joint, and by movements show the effect of the injury and his ability to use it."

No dramatic exhibition of the stump was made. (R. 95.)

See also *Mulhado vs. Brooklyn* 30 N. Y. 370.

Assignment XXXI simply was the proof of the admitted allegation of the Complaint that the injury

had closed the career of Captain Ward in the army; but as the Complaint was not read to the jury, perfunctory yet proper and necessary evidence was thus offered, there being no objection that the Complaint was not read upon this point. (R. 95-96, and 10.)

Assignment XXXII, not argued, hardly merits mention, but suffice to say that "Courts take judicial "notice of the standard tables of life expectancy, and "such a table which is satisfactory to the trial court "is admissible in evidence without preliminary proof "as to its authenticity and reliability."

Valente vs. Sierra Ry. Co., 151, Cal., 534.

Keast vs. Santa Ysabel, etc., Co., 136, Cal.,
256-9.

Vicksburg, etc., Rd. Co. vs. Putnam, 118, U. S.,
582.

Assignment XXXIII. The Record (96-97) thus runs: "Q. Captain, do you know the age at which officers of the United States Army are retired?

"Mr. Gortner—Objected to as purely speculative.

The Court—A matter of law. They are retired under an act of Congress. You may answer.

A.—It is under act of Congress. At sixty-four years of age. I was receiving a salary of twenty-four hundred dollars a year, besides allowances, and so forth."

No other objection was made and no motion to strike out. It is thus manifest that the learned

Trial Court took judicial notice of a matter established by law, and at once stated and allowed the witness to repeat what might at any fit time during the trial or by way of an Instruction have been communicated to the jury.

The statute of retirement at the age of 64 years may be found in the Act of June 30th, 1882. (Vol. 22 page 117) R. S. 1243, 1244; 1260.

Assignment XXXIV is, when the reply of the witness (R. 97) is noted, absolutely identical in principle with Assignment XXXIII, save that the witness stated only a matter of law, and no motion was made to strike out.

Assignment XXXV was “objected to as not the best evidence”—no other objection—(R. 97-98) and no motion to strike out.

The Record does not show whether or not the witness was reading from statutes of Congress in his possession; but the Record does show that Plaintiff in Error nowhere challenged the correctness of the matters, mixed of both law and fact, to which the witness testified. The remedy for the error, if such it were, was absolutely and completely in the hands of Plaintiff in Error by the production of his own book containing the statutes, so far as they were stated by the witness.

After the learned Trial Judge had taken the initiative, as above outlined—after the Plaintiff in Error

had failed to explicitly demand the production of the statutes—after it had made the most perfunctory objection quoted—to now claim that it suffered substantial harm would seem a pitiful mockery of justice and the rational administration of law.

The allegations of the complaint (II and XII) admitted by the Answer, had not been read to the jury, and beside, they contained mere ultimate facts, which did not, because they were so admitted, render evidentiary facts inadmissible.

Assignment XXXVI. The objection was that the question was “incompetent, irrelevant and immaterial, invading the province of the jury.” The reply of the witness (R. 98 and 99) that he would have earned by *the fixed rule of promotion* at the age of retirement—64 years—a hundred and six thousand and some odd dollars may be regarded distinctly from two general view-points.

First, that if the evidence were erroneously admitted, it was cured by the Instructions of the Court upon its own motion. (R. 201-202.) We quote: “I don’t know that it is necessary to give you any “further instructions for your guidance, gentlemen, “but in the event that you find for the plaintiff, it “will be necessary for you to assess the amount of his “recovery. That amount you cannot compute in dollars and cents. The law leaves that question to “your sound sense and sober judgment. You will “compensate him for any pain and suffering he has “endured in the past; you will compensate him for “any pain and suffering he will endure in the future;

“you will compensate him for any loss he has sustained through the impairment of his earning capacity in the past, and you may compensate him for any loss he will sustain through the impairment of his earning capacity in the future; but, gentlemen, *“you must not conclude that his earning capacity is totally destroyed because he can no longer follow the life of a soldier.* The law does not tolerate idleness; it compels men to work at some other employment, and it is the duty of this plaintiff to earn money in some other vocation that he can follow in his present condition. In allowing a recovery, you must further remember, gentlemen, that whatever sum you allow is paid in money at the present time, and that a dollar to-day is worth a great deal more than a dollar to be earned five, ten, fifteen, twenty or twenty-five years in the future.”

The amount of the verdict returned—\$15,500—proves conclusively, in any event, that the above testimony of Captain Ward did not affect the amount of the verdict.

Second, the other point of view, and the one we believe to be the law, is that the evidence was competent, relevant and material under any sort of objection.

The evidence did not come within the inhibited province of speculation, because the promotions and salaries were under *a fixed rule* to the age of Sixty-four.

Such, indeed, was the wording of the question (R. 98) but, what is more important than all else in this

matter, the answer of Captain Ward did not go as far as the question, but was strictly *limited to his actual rank, that of Captain*. We quote his words: “A. “I made the computation in my rank as Captain, and “it amounted to a hundred and six thousand dollars “up to the date of sixty-four years of age. I didn’t “consider my promotion to a major, which would have “occurred in a certain length of time because I “couldn’t tell the exact date when it would occur. I “could only tell about when it would occur, so I didn’t “consider my promotion. I made it at my present “actual rank, and it amounted to that amount, a “hundred and six thousand and some odd dollars.” (R. 98-99.)

Upon cross-examination, Captain Ward testified that he was “retired on a captain’s pay” (R. 99), his career in the army closed. (R. 95-96.)

May we be pardoned for reverting for illustration to the Federal Bench? As a matter of law, we understand that members of our Federal Bench receive so much fixed salary during life or until they retire. Let us suppose (God forbid the occurrence) that the Honored Chief Justice of our National Supreme Court had been at Paso Robles in that crowd, ticket in his pocket, so to speak, a waiting passenger; that he had suffered the accident sustained by Captain Ward or some correlated injury, say loss of sight—whereby he could no longer fulfill the august duties of his great office; would it not be competent for him to prove, in an action for damages for his injury, the loss of his salary as Chief Justice during his expec-

tancy of life or until a fixed period for retirement, if such there were?

[Rights of promotion (26 Stat. 562) Act, Oct. 1st, 1890 (5 U. S. 50) (95 U. S. 760). Same rights irrevocable.—Opinion Att’y Gen., Vol. 12, Page 365.

Pay active (not retired) 35 Stat. 108, Act May 11th, 1908. 10 per cent increase, etc. R. S. 1262, 1263, also Act, Feb. 24th, 1881. (2 Stat. 364.)

Commutation quarters, (34 Stat. 1168) Act, March 2, 1907.

Heat and light, Act March 2, 1907 (34 Stat. 1167) and Army Reg. (1910) Par. 1052, 1060, 1073.]

In Captain Ward’s case, the expectancy of life was 31.78 years (R. 96) ; but the computation of his earnings was limited within the period of retirement at 64 years and to his rank at the time the Government actually retired him on a Captain’s pay because his injury had closed his career in the army, at the age of thirty-five.

In *Zibbell vs. Southern Pacific Co.*, 160, Cal., p. 249, it is said: “The rule is that under the plea of general damages and to prove a loss of earning capacity, it is permissible to show what wages, salary, or emoluments, would be open to the plaintiff in a business, vocation, trade or profession which he under-

“stands, and which he would have the right and ability to follow were it not for his incapacitating injuries.” (In the Zibbell case, the trial Court admitted evidence that Plaintiff, when injured, was earning “from \$2000 to \$2500 up to \$8000 and \$10,000 a year,” as a professional trainer and breeder of trotting horses.)

The Opinion thus proceeds: “In this view the evidence was pertinent and permissible. It bore directly upon an occupation for the pursuit of which plaintiff had shown himself fitted and qualified and which he was following; and the rule as we have stated it is not at all in conflict with the other rule which forbids testimony of mere hopes or mere prospects of advancement, the rule declared in such cases as *Richmond & Danville R. R. Co. vs. Elliott*, 149, *U. S. 266* and *Richmond, etc., Ry. Co. vs. Allison* 86, *Ga.*, 145, etc.”

How much better fortified in law than Zibbell—in his profession of horse-trainer—is the Defendant in Error, whose salary and promotion were determinable under a *fixed rule*, and who only introduced in evidence a computation of his future earnings based solely upon the rank in which he was retired? There was, there is no speculation whatever about such earnings condemned in any case we know; on the contrary, it is clearly implied in *Richmond & Danville R. R. Co. vs. Elliott*, *supra*, that it would be proper to prove what earnings Captain Ward would have received by a “fixed rule of promotion.” This would have been a very much larger sum than that computed and testified to by Captain Ward.

We call attention to a most interesting English case where a physician was finally awarded sixteen thousand pounds; Lord Justice Bramwell intimating that a larger verdict would have been justified. The case: Phillips vs. London & South Western Railway Co., 4, Law Reports, Q. B. Div. 406—was reversed on the ground that seven thousand pounds was inadequate in view of the loss of the plaintiff.

On the second trial before Coleridge, C. J., a verdict for the first-mentioned sum (practically \$80,000) was returned.

The decision of this appeal is contained in Phillips vs. London & S. W. Ry., 5 Law Reports 287 (Common Pleas Division). The case is there noted as—"Action to recover damages for personal injury sustained by the Plaintiff, a medical practitioner of *eminence*, through the negligence of the defendant's servants. At the trial before Field, J., the jury awarded the plaintiff seven thousand pounds damages. The Queen's Bench Division directed a new trial on the ground of the inadequacy of the damages, conceiving that the jury had failed to take into account all the heads of damage in respect to which the plaintiff was by law entitled to compensation, more especially the pecuniary loss which he had sustained through his inability to practice his profession. (Phillips vs. South Western Ry., 4 "Q. B. Div. 406."

The award of Sixteen thousand pounds was affirmed.

Measured by the most frigidly hostile standards, there was no error in the admission of Captain Ward's testimony.

Assignments XXXVII, XXXVIII, XXXIX have each been fairly included in the principles and authorities hereinbefore advanced.

Assignments XL, XLI, XLII, XLIII, XLIV have likewise been argued under other heads, as well as generally; and it may only be added that the Instructions, except XLIV, are almost literal transcripts of the sections of the Civil Code of California, defining the duties of common carriers of passengers, and sustained by such cases as *Taylor vs. Penn.*, *supra*, and *R. R. Co. vs. Treat*, *supra*, and other cited cases.

And, we also ask this Court to bear in mind that all the Instructions given in the case were consented to by counsel on both sides. (R. 203.)

This consent was, in no way, coerced; and we think that all the exceptions taken to Instructions by Plaintiff in Error were abandoned, and that it is not fair to the learned Trial Court nor to Defendant in Error for counsel to now complain concerning that to which counsel gave their express agreement in advance of the verdict.

But for other reasons, apart from the fact that it is thus assigned as error, we wish briefly to discuss Instruction N.—Assignment XLV.

Counsel affirm that—"The instruction fails to limit itself to negligence directly or proximately pro-

“ducing the accident or contributing thereto. No—where in the instructions does the court seem to “have cured this by giving the jury a direction that “negligence, to be actionable, must be *proximate* to “the injury.” (Brief p 52.)

To this, we reply that Instruction I. (R. 189) tendered by Defendant in Error and given by the Court, does make the limitation that “the measure of damages is the amount which will compensate plaintiff for all *the detriment proximately caused by the accident.*”

And, in the Instructions, given by the learned trial Court, upon its own motion, we find these words: “And if you find from a preponderance of the testimony in this case that the defendant was guilty “of negligence and that that negligence was *the proximate cause of the injury to plaintiff*”, etc. (R. 201.)

Again: “I have defined to you the different duties “which are imposed upon railroad companies by the “common law and by the statutes of California. “You must find from a preponderance of the evidence, not only that there was a breach of these “statutory or common-law duties, but *you must further find that such breach of duty was the direct “and proximate cause of the injury to the plaintiff.*” (R. 201.)

The purpose we had in tendering Instruction N—is that one of the witnesses for the railroad company gave testimony—contrary to all plaintiff’s witnesses—that the injury was caused by the reckless action

of a teamster, in seizing the handle-bars of the incoming train, which action, in turn, caused Defendant in Error to be struck and thrown under the train. (R. 112-120.)

Although the jury undoubtedly rejected this testimony as false and self-destructive, still, we could not know, beforehand, that it would do so. We accordingly tendered Instruction N—upon the theory that if the jury accredited the witness, that nevertheless, the Plaintiff in Error would not be relieved of responsibility, under all the facts of the case.

We understand that “an independent wrongful act, to constitute the proximate cause of an injury, “by displacing the original primary cause, must be so “disconnected in time and nature as to make it plain “that the damage occasioned was in no way a natural “or probable consequence of the original wrongful act “or omission—and that the original act of negligence, “the primary causation, may be in its nature so continuous that the concurrent wrongful act precipitating the disaster or injury will in law be regarded not “as independent, but as conjoined with the original “act to create the disastrous result.”

Merrill vs. Los Angeles, etc., Co., 158, Cal., 499,
503-507.

Muhlhouse vs. Monongahela Street Ry. Co., 201
Penn. 237.

Even if we give fullest credence to the testimony of said witness, still, as said in Spear vs. United Railroads, 16 Cal., App. on p. 660: “The conclusion is irresistible that appellant’s negligence was a

“proximate concurring, if not the sole proximate, “cause of the injury.” Sustaining our position that the evidence of the witness as to the reckless act in question, if accepted as true, would not under all the facts, relieve Plaintiff in Error—we also cite the following:

Shearman & Redfield on Negligence, p. 122.

Thompson on Negligence———p. 75.

West Chicago St. Ry. vs. Piper 165, Ill., 325.

Shrum vs. Cincinnati & M. V. Ry. Co., 10
Ohio Dec. (Supp. Com. Pleas) 244.

If this Argument has, perhaps, seemed too long, our apology is that the injury to our client is grave and sad, and we have wished to fully present the matter to this Court with reasons for our conviction that the judgment should be affirmed.

Respectfully submitted,

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Attorney for Defendant in Error.

M. H. HYLAND,
Of Counsel.

No. 2249

United States
Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

Southern Pacific Company, a corporation,

Plaintiff in Error,

vs.

John Wilbur Ward,

Defendant in Error.

ADDITIONAL BRIEF FOR PLAINTIFF IN ERROR.

(This brief is filed in pursuance of the permission given on the oral argument of the case.)

THE COMPLAINT AND THE PROPOSITION THAT THERE IS NO CAUSAL CONNECTION BETWEEN THE ALLEGED NEGLIGENCE AND THE ACCIDENT.

The defendant in error seeks to charge the plaintiff in error in this action with negligence causing the injury, and the claims made are:

I. That as the train of the defendant approached Paso Robles station, "it had negligently failed in preparation to accommodate said crowd."

2. That plaintiff in error knew there would be a general movement and surging of said crowd to obtain and secure accommodations.

3. That it would be extremely dangerous to approach said station of Paso Robles, except at a rate of speed whereby said train was under perfect and instant control.

4. That plaintiff in error had neglected to employ any means to maintain order in said crowd.

5. That plaintiff in error was in duty bound to furnish *sufficient* servants to *secure* the safety of defendant in error.

6. That by reason of the movement and surging of said crowd, the defendant in error was jostled to and against said moving train, and that his right leg was run over.

One of the indispensable essentials to the maintenance of this action is that there must be a preponderance of evidence to show a causal connection between the negligence alleged and the accident resulting in the injury to the defendant in error. The negligence must appear to be the proximate cause without the intervention of an efficient agency causing the result complained of. The law requires that there must be a complete chain of causation effectuating the result. In this case there is no pretense that the speed of the train was so rapid as to draw defendant in error toward the train. The defendant in error was in full possession of his faculties. He was in a position where he might have remained with or retired from the crowd. If the train were going rapidly it must have acted as a warning to

him and the others present against any attempt to get on the train. To contend that the speed of the train was the cause of the injury to this defendant in error is to contend that because of its speed the crowd present was prompted to make the rush toward it and an effort to board it while it was moving. This in itself is an act of culpable negligence, which would effectually bar anyone thereby injured from recovery. Defendant in error must either concede that he participated in the effort to board a rapidly moving train with others, or contend that he did not voluntarily move in the direction of the train but was carried there by the crowd, which had given no previous indication of disorder or of such attempt or intent. No matter how rapidly the train was going, he will not say he attempted to board it; and, therefore, if he had nothing whatever to do with the train while in motion, if it in no way influenced him nor controlled his action, the speed bears no relation to any act of his, and certainly none to his injury.

As is remarked in the case, assuming the testimony of the defendant in error relative to speed to be true, "A man would have been a fool to try to board the train the rate it came in." [R. p. 47.] "There was no rush for the train as it came in." [R. p. 47.] The witness Light did not see any one trying to board the steps of the train at the time Captain Ward fell. [R. p. 47.] "The crowd was very orderly before the train came in; there was absolutely no disorder at the station at all." [R. p. 41.] "It was not a disorderly crowd." [R. p. 50.] "There was absolutely nothing that indi-

cated to my mind as an officer that those men were going to need to be controlled." [Testimony of William H. Anderson, p. 58.] "I did not see any disorder in the crowd; nobody running." [R. p. 64.] "There was not a particle of disorder among any of them at any time." [R. p. 61.] "The plaintiff made no attempt to board the train." [R. p. 93.] "While the train was in motion I did not move forward to try to board that train." [R. p. 94.] "There was nothing occurred outside of the natural surging of that crowd to get accommodation on that train before this accident occurred to me." [R. p. 93.] "The crowd was very orderly before the train came in. There was absolutely no disorder at the station at all." [Testimony of H. B. Light, R. p. 41.] "I did not see any disorder in the crowd; nobody running." [Testimony of the witness Knowles, R. p. 64.] The defendant in error testified in the court below: "I don't know that any individual pushed me under the train at all. I don't know whose body was in contact with me when I fell." [R. p. 100.] He simply gives an inference or an explanation of his opinion as to how it happened [R. p. 102], and further states: "I don't know who it was that caused me to fall down." [R. p. 103.] Before the happening of the accident the crowd was so orderly that he saw no occasion to police the crowd nor direct the soldiers. [R. p. 101.]

These excerpts from the testimony, which indicate its general trend, are all testified to either by the plaintiff in the court below or the witnesses who testified in his behalf. The testimony of the defendant in the court

below is overwhelmingly in support of the defenses, and in negating the allegations of the complaint relative to negligence. From a careful consideration of this testimony, as well as all the testimony introduced in the case, it seems that the element in reference to the speed of the train has been effectually eliminated; and further, that there was no crowding, no disorderly conduct, and nothing whatever to indicate to any agent or officer of the plaintiff in error that any disorderly conduct was about to occur. In short, the testimony is that the crowd was quiet and well behaved, and that there was nothing present to give the most careful man any intimation that there would be disorder or that this accident might occur. It is safe to say that it will be presumed that men who are accustomed to the discipline that ordinarily obtains in the army would not in any wild rush precipitate an officer of the army under the train. It is certainly not negligence for the company to assume that this would not occur. There is no substantial evidence that this unfortunate accident was the result of any act of the plaintiff in error, or was due in any way to any conditions that existed at the Paso Robles station on the night in question. There is an entire absence of evidence to show the cause of this accident, and in such situation there should have been no recovery, because it is incumbent upon the plaintiff in an action of this kind to establish by a preponderance of evidence that the negligence alleged caused the accident. The undoubted rule is that in alleging a cause of action or in proving a liability for negligence, it is incumbent on the person asserting

negligence to show by competent proof that there is a logical and causal connection between the negligence charged and the happening of the event resulting in the injury.

Smith v. Buttner, 90 Cal. 95;

Villesback v. Larkey, 12 C. A. D. 217;

Lang v. The Lilley & Thurston Co., 15 C. A. D. 579;

McGehee v. Schiffman, 4 C. A. R. 53;

Fisher v. Western Fuse Co., 12 C. A. R. 247;

Rathbun v. White, 157 Cal. 254;

Cary v. Los Angeles Ry. Co., 157 Cal. 653
et seq.;

Stein v. United R. R., 159 Cal. 370.

CROWDING OF CARS AFTER THE ACCIDENT.

The charge in this case was that the plaintiff in error was guilty of actionable negligence. All the conditions and contingencies relied upon by the defendant in error relate to and depend upon a time prior to the happening of the accident. The theory of the defendant in error, as expressed in his complaint, depends upon conditions before and at the time of the accident; and further it was essential that the plaintiff in error knew of or had reason to believe the existence of these conditions. Yet, against the objection of the plaintiff in error, the court permitted the introduction of testimony tending to show that some considerable time after the happening of the accident the cars were overcrowded, as shown by the testimony of H. B. Light, and included in exceptions 6 and 7. To emphasize this

testimony and give it additional importance, the court, at the request of the defendant in error, gave instructions E, F and G [R. p. 188], and H [R. p. 189], which were in effect that plaintiff in error “must furnish sufficient accommodations for the transportation of all such passengers”; “that such carrier of persons must not overcrowd or overload his vehicle”; “that every railroad corporation *must furnish, on the inside of its passenger cars*, sufficient room and accommodation for all passengers.” The court further instructed the jury that “in determining whether or not the defendant was guilty of negligence in propelling its engine and cars into Paso Robles station * * * this is a matter for you to determine *in connection with all the evidence introduced before you.*” [Instruction O, p. 190.]

There was no allegation in the complaint charging the plaintiff in error with overcrowding cars, nor was there the slightest intimation that the plaintiff in the court below would rely upon the trial of the action upon this factor, if such it were, to show that the injury was caused by or attributed to any overcrowding of the train, nor could such contention be reasonably made. It is not even claimed that the crowded condition of the train had any influence or effect whatever upon the minds of the persons who were waiting at the station at Paso Robles for the train to come in, nor is there any connection whatever shown between the condition of the cars either before the happening of the accident or afterwards, and the accident. It is certainly not relevant to show that the plaintiff in error had overcrowded cars after the happening of the accident,

for that does not throw any light whatever upon the issues made by the pleadings. It shows a condition existing subsequently which bears no relation to the principal issues in the case. It does not appear in evidence, nor even by inference, to what extent any cars were overcrowded before they came into the station, or to what extent this crowd was augmented by additional passengers at Paso Robles. The general rule is that subsequent conditions, that is to say, conditions existing after the happening of the accident, are irrelevant for the purpose of proving negligence, and it is inconceivable that this testimony should be introduced upon any other theory.

Sappenfield v. Main St. etc. R. R. Co., 91 Cal. 48.

DEGREE OF CARE.

This case was presented to the jury by the court, and the attorney for the defendant in error, upon the theory that the defendant in error was a passenger in the broadest sense of that term, and as such was entitled to the highest degree of care in his situation at the railroad station, regardless of the reasons of the rule calling for the exercise of the highest degree of care. [Instruction No. 20, R. p. 184, and the additional instructions given on the court's own motion, R. p. 201.] This question was fairly presented on the record [Exception 39, p. 184], and our contention is that the court erred in refusing to instruct the jury that the plaintiff in error was only bound to exercise ordinary care with reference to the defendant in error,

when he was waiting at the station intending to become a passenger on the train in question.

Falls v. S. F. & N. P. R. R. Co., 97 Cal. 114;

St. Louis Iron Mt. & S. Ry. Co. v. Woods, 33

L. R. A. (N. S.) 862;

Taylor v. Pa. Co., 50 F. R. 755.

It is true that there are a few cases holding that a carrier must exercise the highest degree of care toward a person who is on its station ground or in its depot intending to become a passenger; but it will be readily observed that these cases all refer to some condition of facts entirely different from the one under consideration; that is to say, they are cases dealing with a carrier and an intending passenger, where the latter was injured by some instrumentality of the carrier or where some structure was defectively or dangerously arranged, and we contend that the reasoning of these cases does not apply to the case now under discussion.

Knight v. Portland S. P. R. Co., 56 Me. 234;

Fremont E. & M. Valley R. Co. v. Hagblad, 72 Neb. 773;

Louisville N. A. & C. R. v. Lucas, 119 Ind. 583.

It is, therefore, not denied that a small minority of the cases hold for the rule that a person on the station ground, intending to become a passenger on a railroad carrier, is to be regarded as a passenger; but all these cases present different phases of fact from the one now under consideration, and therefore can not be safely regarded as authorities in the present case.

A different rule obtains in respect to the degree of care which the carrier is bound to exercise in a case where the intending passenger is in a situation similar to that of Captain Ward. This case affords an instance where the reason for the highest degree of care did not exist. The defendant in error was at the station in the full possession of all his mental and physical faculties. The carrier had no physical or other control of him. He might, if it pleased him, have taken this train or waited for another. No direction was held out to him as to his personal conduct. There were no appearances of control upon which he was either expressly or impliedly invited to rely. He could, if he desired, have chosen his associates and his position on the ground. The speed at which he would approach the train was a matter of his personal control. It was all optional with him as to how he should go upon the train. No physical control was exercised, or attempted to be exercised over him whatever. He was to all purposes a free agent, with the obligation resting upon him to act with discretion and care for his own safety. The rule for the highest degree of care is invoked only where there is a control with the carrier. If the passenger surrender himself to the direction and custody of the carrier, he then abandons his own course of action, and because of this control throws the responsibility for his protection upon the carrier; and because of this condition of abandonment of person and care, the custody rests with the carrier, and the law imposes upon the latter the exercise of the highest degree of care. There is another reason for the appli-

cation of the rule for the highest degree of care, and that is that the increased hazards of transportation are only present when the passenger is in transit, and hence the greater the danger the higher the degree of care. In all the cases apparently sustaining the rule contended for by the defendant in error, and in which the court instructed the jury, the element of personal control of the intended passenger was absent, so that this case can be easily differentiated from the cases relied upon by counsel for the defendant in error. The rule invoked by the court below, in itself a strict one, should not be applied unless the elements for its application are present. It is conceded in this case that there was no control, or attempt to control the defendant in error while he was on the platform of the station or on the grounds of the station. To put it more accurately, he was allowed to act as his prudence might dictate. As the plaintiff in error had no control of him at this time, it can not be held to the strict accountability employed as a rule by the learned judge who tried the case in the court below.

The case of

Falls v. S. F. etc. R. R. Co., 97 Cal. 114, *supra*, which is virtually a construction of the provisions of section 2100 of the California Civil Code, points out quite clearly the reasons for the application of the rule of law in this class of cases. The rule of the case referred to is sustained by the majority of the cases, notably:

Louisville etc. Co. v. Espenscheid, 17 Ind. App. 569;

Gunderman v. Ry. Co., 58 Mo. App. 381;
St. L. Iron Mt. & S. R. Co. v. Woods (Ark.),
131 S. W. 689;
Wood v. Pa. R. Co., 117 Pa. 306, 35 L. R. A.
199;
Taylor v. Pa. Co., 50 Fed. Rep. 755;
6 Cyc., 605, and cases cited.

There is a marked distinction between this case and the cases cited and relied upon to sustain the rule of the court as expressed in the instructions. In all the cases of this latter class some instrumentality of the carrier, defective in construction and dangerous in operation, produced the injury. The carrier was responsible for its construction or maintenance. Certainly it was subject to its inspection and under its control. It was its legal duty to keep such physical agency of its business in a proper condition, and with all these opportunities of observation and control, it is not extremely burdensome under the exigencies of these cases to hold the carrier to more than the ordinary degree of care. But the case at bar is essentially different in its material features. The defendant in error was the master of his own person. He could go and come as it suited his pleasure or convenience. The rule of the carrier's exclusive protection did not apply to him. The carrier exercised no physical control or power. The defendant in error relied upon no instrumentality of the carrier, and was in the enjoyment of every physical power and capability for his own protection. The reason why a carrier is charged with the highest degree of care is because the passenger has surrendered

his volition to the carrier. This element was entirely absent in the present case, while the defendant in error was at the station, and its absence makes the rule employed by the court in the instructions referred to wholly inapplicable, and imposes a greater burden upon the plaintiff in error than the law warrants. The effect of this rule, as expressed by the court, is found in the verdict in this case. There was no substantial or any evidence of negligence. There was no showing of how the accident occurred through any agency or instrumentality of the plaintiff in error. The plaintiff in the court below was satisfied to rest his case on surmises. No one can tell how or in what manner it happened, except that Captain Ward either tripped and fell or was jostled by some one. In either event plaintiff in error would not be liable. Yet, with the rule of the court as to the highest degree of care impressed upon the minds of the jurors, it is not difficult to understand how the great responsibility imposed by these instructions assumed the character of evidence and served in lieu of proof, and thus turned the scales against the plaintiff in error.

The instructions of the court imposed a greater burden upon the plaintiff in error than the law declares, and the refusal to give the instructions requested by the plaintiff in error in the court below was at variance with the well-established rule of the cases.

Kelly v. Manhattan R. Co., 112 N. Y. 443;

Skottowe v. Oregon Short Line & U. N. & R. Co., 22 Or. 430;

Gulf C. & S. F. R. Co. v. Gross (Tex. C. I. V. App.), 21 S. W. 183;

St. L. I. N. & S. R. Co. v. Wilson, 70 Ark. 136;
Ga. C. & N. R. Co. v. Brown, 120 Ga. 380;
Ill. C. R. Co. v. Keegan, 210 Ill. 150;
Louisville & N. R. Co. v. Wolfe, 80 Ky. 82;
Gulf & S. F. R. Co. v. Butcher, 83 Tex. 309.

The rule to be deduced from all these cases and many more that might be cited is,—the carrier is to provide a reasonably safe place for the accommodation of those awaiting the arrival or departure of trains, and to take such precaution for their safety as would naturally occur to ordinarily prudent and careful men, and to guard against such dangers of accident as are likely to occur or are reasonably to be apprehended by prudent men. We respectfully submit that, in view of these cases and the reasons assigned for the rules expressed, prejudicial error exists in this case, and for this reason alone we are entitled to a reversal of the judgment.

INSTRUCTIONS.

This case was presented to the jury, so far as the instructions are concerned, upon various theories and in respect to various duties of the company. Many of these instructions are wholly inapplicable to this case, and seem to have been formulated upon the theory that every claimed failure of the company to comply with the law should be taken as evidence of its liability in this case. For instance:

1. Instruction E [R. p. 188] makes the central idea that the company shall “run its cars for the transportation of persons at such regular times as it shall fix

by public notice.” There is nothing at issue in this case charging the company with any injury or damage by reason of the train in question being late; nor would the fact that the train was late in any way cause or contribute to the injury of Captain Ward. The same may be said in reference to the other elements of instruction E.

2. Instruction F [R. p. 188] should not have been given, because there was no contention but that the vehicles were safe and fit for the purpose for which they were used. Nor should the court have instructed the jury that “a carrier of persons must not overcrowd or overload his vehicle.” If the court intended by this instruction to say that the overcrowding of the cars of the plaintiff in error was an element in the case, it ought at least to have limited it to a time before the commencement of the happening of the accident; but upon no theory of law was this an element entering into the case. The accident would have occurred, and could have occurred, regardless of the condition of the cars; but it appeared in evidence in this case that the cars were overcrowded after the happening of the accident; and as the court saw fit to instruct the jury as to the duty of the common carrier in this respect, it is only safe to assume that the jury heeded the instruction and held it against the plaintiff in error.

3. Instruction G [R. p. 188] makes it incumbent upon the railroad corporation to furnish “on the inside of its passenger cars sufficient room and accommodation for all passengers to whom tickets are sold.” This is another instance where the instruction was wholly

irrelevant, and yet there is evidence in the case to show that the cars were overcrowded after the happening of the accident. We have heretofore presented that question regarding the admissibility of evidence. The court considered this an important issue in the case, and it certainly had an impressive effect upon the minds of the jury, because the court, after sanctioning the admission of this evidence, instructed the jury upon this duty, as pointed out in the evidence. It goes without saying that with this evidence before the jury, followed by an instruction, they came to the conclusion that in this respect at least the carrier was derelict in the performance of its duty.

4. Instruction H [R. p. 189] makes it incumbent upon the common carrier to provide every passenger with a seat. We are at a loss to know how that duty in any way related to this case. It seems to have been given for no other reason than that it appeared in evidence that there were passengers who were not provided with seats, and thus counted one more violated rule to be urged against the company.

5. Instruction I [R. p. 189] is unfortunately worded, in that it assumes that the word "damage" is synonymous with "injury."

Wales v. Pac. E. Motor Co., 130 Cal. 524.

And further, and subject to objection, it tells the jury that the plaintiff is entitled to damages which will compensate him for the detriment proximately caused by the accident. Evidently the court intended to say proximately caused by the injury. Further, the jury are informed that they may assess the damages as

“under all the circumstances of this case in evidence the plaintiff *ought to recover*.” It is respectfully submitted that the expression “plaintiff ought to recover” gave too great a latitude to the jury, and permitted them to substitute their ideas of abstract justice for the rule of law.

Fries v. Am. etc. Co., 141 Cal. 613;

Melone v. Sierra Ry. Co., 151 Cal. 117.

6. Instructions J and K [R. p. 189] are without the issue in this case. It may be said of them, as was declared in

Dauphney v. Buhne, 153 Cal. 765:

“It is always injudicious to take the language of a court in discussing a proposition of law as correct instruction to be given to a jury. General language is often there used which would be inappropriate as an instruction, and this instruction is an illustration of it.”

7. Instruction L [R. p. 190] is entirely foreign to the issues, and bears no relation to the evidence introduced in any aspect. It was not contended by defendant in error that his accident was due to an unsafe place, or that he met with any injury as the result of assuming that the company had provided a place of safety for him. His alleged grounds of action are entirely different from anything referred to in this instruction, and therefore the instruction is wholly inapplicable to the case.

8. Instruction M [R. p. 190] refers to a case where violence has been inflicted upon a passenger of a common carrier. Under such circumstances it is held that the duty rests on the carrier to provide sufficient pro-

tection for the passenger. In this case it is somewhat difficult to see what protection was necessary in the sense of warding off danger, because Captain Ward was with his friends and in no danger of any harm, and certainly there was no necessity for any protection.

Falk v. N. Y. & S. W. R., 56 N. J. L. 380;

Renneker v. S. C. Ry. Co., 20 S. C. 219;

Hart v. Seattle R. & S. R. Co., 37 Wash. 424.

THE TESTIMONY AS TO PROMOTION AND THE COMPUTATION OF DAMAGES BY DEFENDANT IN ERROR.

Exceptions numbers 33, 34 and 35 [R. pp. 97, 98], discussed in Points V and VI of the opening brief herein, call attention to the stating of a possibility of promotion in the army and the making of a computation, over objection by plaintiff in error, by the witness John Wilbur Ward in his own behalf, as to the amount of money he would have earned. When the defendant in error was injured, he was a first lieutenant [R. p. 99], and thereafter, and before his retirement, he was promoted to a captaincy. He was permitted to make and place in evidence a computation in his rank as captain, although at the time of said injury the rank he held was first lieutenant. The fact that such promotion was given to him while he was in the hospital, and possibly in order that he might be retired on a captain's pay for the disability, is no evidence that he would have received such promotion under other circumstances. In other words, the contingency has been made the basis for testimony (which in itself we deem improper) of a largely increased amount of prob-

lematical future earnings. Defendant in error testified that, making a computation in the said rank of captain, the amount of money he would have earned was \$106,000. His age was 35, and up to the time of retirement, at 64, twenty-nine years would have elapsed. In round figures, therefore, he testified to a loss of a captain's pay in the sum of about \$3600 per year. His promotion, assumed by him as a certainty, depended at all stages upon passing an examination. [1 Sup. R. S. p. 812.] If the accident itself, resulting in disability, effected his promotion and retirement under increased rank and pay according to subd. 4, sec. 3 of the statute, it was improper to use that increased rate of pay as the measure of a loss of future earnings which would have been gained if he had *not* been injured. The loss of future earnings of a person injured should certainly not be calculated on an increased rate of pay resulting from the injury itself, but upon the present earnings of the injured person, which he would have continued to enjoy if *not* injured. And possibilities of promotion are not proper elements to be taken into consideration. In the case of *Richmond R. Co. v. Elliott*, 149 U. S. 267, 37 L. Ed. 728-30, the precise question is thus discussed:

“The first question to which our attention is directed arises on the admission of testimony in respect to the probability of plaintiff's promotion in the service of his employer, and a consequent increase of wages. * * * He was asked this question: ‘What were your prospects of advancement, if any, in your employment on the railroad and of obtaining higher wages?’ In response to that, and subsequent questions, he stated that he

thought that by staying with the company he would be promoted; that in the absence of the yardmaster he had sometimes discharged his duties, and also in like manner temporarily filled the place of other employees of the company of a higher grade of service than his own; *that there was a 'system by which you go in there as coupler or train hand or in the yard, and if a man falls out you stand a chance of taking his place'*; and that the average yard conductor obtained a salary of from sixty to seventy-five dollars a month.

"We think there was error in the admission of this testimony. It did not appear that there was any rule on the part of the Central Company for an increase of salary after a certain length of time, or that promotion should follow whenever a vacancy occurred in a higher grade of service. The most that was claimed was that when a vacancy took place a subordinate who had been faithful in his employment, and had served a long while, had a chance of receiving preferment. But that is altogether problematical and uncertain to be presented to a jury in connection with proof of the wages paid to those in such superior employment. Promotion was purely a matter of speculation, depending not simply upon the occurrence of a vacancy, *but upon the judgment or even whim of those in control*. Of course, there are possibilities and probabilities before every person, particularly a young man, and a jury in estimating the damages sustained will doubtless always give weight to those general probabilities as well as to those springing from any peculiar capacities or faculties. But that is a different matter from proving to the jury the wages which some superior officer receives, and then exaggerating in the minds of the jury the amount of the damage which has been sustained, by evidence tending to show that there is a chance of plaintiff being promoted at some time to such higher office. It is enough to prove what the plaintiff has been in fact deprived of; to show his physical health and

strength before the injury, his condition since, the business he was doing (*Wade v. Leroy*, 61 U. S., 20 How. 34 [15:813]; *Nebraska City v. Campbell*, 67 U. S., 2 Black 590 [17:271]; *Vicksburg & M. R. Co. v. Putnam*, 118 U. S. 545, 554 [30:257, 258]), the wages he was receiving, and perhaps the increase which he would receive by any fixed rule of promotion. Beyond that, it is not right to go and introduce testimony which simply opens the door to a speculation of possibilities. Nor was the error in the admission of this testimony cured by the instructions. On the contrary, they seem to emphasize that this chance of promotion was a matter to be considered. This is what the court said: 'I permitted some evidence to be introduced on the subject of the line of promotion in the business in which he was engaged. The plaintiff says, and the jury could consider the fact, that he had a probability of promotion in the line of services in which he was engaged; that the salary of the next grade of services in which he was engaged is from sixty to seventy-five dollars per month; the jury can consider that in finding what his financial or pecuniary loss is. I have permitted the evidence to go to the jury, and I will state to you that the jury ought not to be governed by a mere conjecture or possibility in a matter of that sort; it ought to be shown to the reasonable satisfaction of the jury that the man after a while would earn more money than he was then earning; it ought to be shown to your reasonable satisfaction; it is a matter for you to determine. The evidence has gone to you, and if you believe, if it has been shown to your reasonable satisfaction, that this man would earn more money at some future period, you would be authorized to consider that fact.' Obviously, this directs their attention to this matter, and invites them to consider it in determining the damages which the plaintiff has sustained. While it does say that the jury should not be governed by any mere conjecture or possibility, yet it speaks of the matter as though there was

placed before them a probability of promotion which they ought to consider. That probability was only such as was disclosed by the testimony we have referred to. Such an uncertainty cannot be made the basis of a legal claim for damages. The Code of Georgia of 1882, in section 3072, declares: 'If the damages are only the imaginary or possible result of the tortious act, or other and contingent circumstances preponderate largely in causing the injurious effect, such damages are too remote to be the basis of recovery against the wrongdoer.' Such declaration is only an affirmation of the general law in respect thereto."

Promotion in the army is not a certainty or fixed thing for anyone in that service. It depends upon examination to be prescribed as the President may direct, "to determine fitness for promotion." [Ch. 1241, I Sup. R. S., pp. 811-12, sec. 3.] The examination is undefined and may be varied at will. The physical and mental tests may be changed. It cannot be judicially determined that Lieutenant Ward would have passed any examination, or would have been made a captain if he had not been injured, nor can a court undertake to say whether he ought or ought not to receive promotion. A discretionary board acting under variable rules of the executive has exclusive jurisdiction to determine the matter; and the entire inquiry, in this trial, was pure matter of conjecture.

The case of *Richmond R. Co. v. Allison* (Ga.), 11 L. R. A. 43-50, is approved by the Supreme Court, U. S., in *Richmond R. Co. v. Elliott*, *supra*. It is therein said:

"The ninth ground complains that the court erred in admitting the following evidence, over the

objection of counsel for the defendant, to-wit: 'Q. How soon after his injury (referring to Mr. Allison) were there any vacancies to which promotions could have taken place? A. Vacancies were shortly afterwards, say certainly in the course of the next three to six months, I think, after Allison was hurt. According to Mr. Allison's standing, and the classification which I give, his prospects for promotion to one of these places was good.' The defendant objected to this testimony, and all other evidence of the witness, tending to show prospects of promotion, as being simply the opinion of the witness, and showing a possibility too remote to be the basis of consideration by a jury in finding damages. We think this exception is well taken, and that the court erred in allowing the testimony complained of to go to the jury. The testimony of this witness shows, in substance, that he was the assistant superintendent of the railway mail service of the fourth division; that Allison was a postal clerk under him, and that he had special supervision of Allison's record and work; that the next class above Allison in the line of promotion at the time he was injured was 'class 5,' and that the salary in that class was \$1,300 a year; that Allison was receiving, when injured, \$1,150; that Allison's standing in regard to the basis of promotion was 'first class'; that there was no vacancy in the class above Allison at the time he was injured, but two vacancies occurred in the course of from three to six months thereafter; that there were three men of Allison's class, including Allison, and that the other two stood as well as he did, and both were older than Allison. One had been in the service longer and the other a shorter time than Allison. Political considerations enter somewhat into the appointment of clerks. The promoting power is at Washington; the office here is the recommending power. A vacancy in the class above Allison might be filled sometimes from other routes, and men taken from another route and put in, who occupy, say, a sec-

ond rank. It is in the power of the department under the rules to do that. There is no certainty at all, when there is a vacancy in a position of chief clerk (the clerk in charge), that one of the lower grade in the same route will go up, no more than in any other business. It is not guaranteed. We think this evidence shows that Allison's promotion was too uncertain, and the possibility of an increase of his salary from \$1,150 to \$1,300 too remote to go to the jury, and for them to base a verdict thereon. While it is proper in cases of this kind to prove the age, habits, health, occupation, expectation of life, ability to labor and probable increase or diminution of that ability with lapse of time, the rate of wages, etc., and then leave it to the jury to assess the damages, we think it improper to allow proof of a particular possibility, or even probability, of an increase of wages by appointment to a higher public office, especially where, as in this case, the appointment is somewhat controlled by political reasons. The deputy clerk of this court, for example, is very efficient and faithful, and if there should be a vacancy in the office of clerk of the court it is not only possible, but very probable, that he would be appointed to fill the vacancy, thereby obtaining a much larger salary than he now receives; but if he should be injured as Allison was, and were to sue the railroad company for damages, we do not think it would be competent for him to prove the possibility or probability of his appointment to fill a vacancy in the office of clerk, especially as the personnel of the court, upon which such appointment must depend, might change in the meantime. To allow the jury to assess damages in behalf of the plaintiff, on the basis of a large income arising from a public office, which he has never received, and which is merely an expectancy, and might never be received, or, if received at all, might come to him at some remote and uncertain period, would be wrong, and unjust to the defendant. We believe the rule of most of the railroads in this state

is to promote their employes. An employe commences at the lowest grade, and if he is competent, capable and efficient, he is very likely to be promoted upon the happening of a vacancy above him. If one occupying a lower grade of service were injured, would he be allowed to prove, unless he had a contract to that effect, that his prospects of promotion to a higher grade and better salary were good, and would the jury be allowed to base their calculation and estimate of the damages upon a much larger salary, which he had never received, but merely had a prospect of receiving? It will be observed that the testimony in this case shows that there were two others in the same class with Allison, equally competent and efficient as he was, and it is by no means certain that Allison would have been preferred to each of them, in case of vacancy, and promoted above them. So it could not be said that he was in the direct line of promotion. *Pierce, Railroads*, 303; *Brown v. Cummings*, 7 Allen, 509; *Boyce v. Baycliffe*, 1 Camp. 58; *Brown v. Chicago, R. I. & P. R. Co.*, 64 Iowa, 656.

"This testimony being illegal, and having been objected to, and it being very probable, from the amount of the verdict, that the jury based their calculation upon the increased salary which Allison would have received if he had been promoted, we think it damaged the defendant, and we grant a new trial upon this ground."

The Supreme Court, in the case *supra*, 149 U. S. 266, says of this decision:

"And this decision is in harmony with the general course of rulings. *Brown v. Cummings*, 7 Allen, 507; *Brown v. Chicago, R. I. & P. R. Co.*, 64 Iowa 652; *Chase v. Burlington C. R. & N. R. Co.*, 76 Iowa 675. For this error, which it may well be believed worked substantial injury to the rights of the defendant, the judgment will be reversed."

To like effect is *Colorado Coal & Iron Co. v. Lamb*, 40 Pac. 251, 256:

“Another matter to which our attention is directed, and on which error is predicated, springs from the proof which the plaintiff offered respecting what he insisted were the possibilities of promotion and advancement for his deceased son. The company promptly objected, but the court permitted the plaintiff to prove the different classes of employes which ordinarily work in a coal mine, and the usual wages which they receive. Such proof is altogether too problematic and uncertain as a basis of damages. There are always possibilities of promotion and advancement for every person. Whether any given person will reap the harvest depends on his personal qualities, his industry, his zeal, and the duration of his life. It is impossible, in the nature of things, for proof to be introduced which shall cover the various elements in the problem. As courts have held in similar cases, all evidence of this description is entirely inadmissible.”

CONCLUSION.

Regardless of the degree of care which the law may require of a carrier in such a case as this, it is quite obvious that everything was done which a man of the highest degree of prudence would do under the circumstances surrounding this accident. It did not appear in evidence that a similar or any accident had ever occurred at this station. It did not appear that there had been a “rush” or stampede of these soldiers or of any passengers, and nothing of any kind or character, so far as the evidence is disclosed, was ever presented to the company at that station which would in the slightest degree indicate the occurrence of the accident

complained of in this case. The company provided for the accommodation of its passengers broad, capacious station grounds, which were, as far as the evidence showed, well lighted, free from obstruction, with nothing to impede or obstruct ingress or egress. Defendant in error was familiar with the grounds. He was laboring under no physical disabilities. He was not acting or relying upon any direction of the company or any of its agents. He was free to control his own locomotion in view of any of the conditions present. It will be borne in mind that no complaint is made upon the score that any instrumentality of the company was defective or dangerous or insufficient for the purposes intended.

To recapitulate in part, the defendant in error puts his case upon two principal grounds:

1. That the speed of the train was an immediate cause producing the result. We presume that we have effectually eliminated this contention as a causative agency, because it appears that there was absolutely no causal relation between the speed of the train and the accident. The accident would have occurred whether the train was going in at two or twenty miles an hour.

2. That the surging of the crowd jostled Captain Ward against the train, and thereby threw him under the train to his injury. Complaint is made that the company made no effort to control the crowd. According to the testimony of Captain Ward, already referred to, there was no indication of disorder before the train came in. The crowd was orderly and gave no indica-

tion of a "rush." In brief, there was no tangible evidence, or any evidence, for that matter, that there was to be a "rush," except the hurried movement of persons seeking to board a train. Captain Ward does not say that he was jostled or carried away by the crowd. How could the company, in the exercise of any degree of care, control that crowd? Soldiers, properly disciplined, courteous and well-behaved in the presence of a superior officer, will not be presumed to jostle one of their officers. The company could reasonably assume that no such actions would take place, and hence no duty of policing the crowd existed. The contention, suggestively made, that there should be a "policing," or, as the court instructed the jury, that plaintiff in error was required "to employ *sufficient* servants for the protection of such passengers [Instruction M, R. p. 190], is without warrant in law or reason. Some such precaution might be deemed necessary if those who waited at the station had been a crowd exhilarated by the festivities of a picnic, or had given the company any evidence of a turbulent disposition; but in this case, according to the testimony, there was absolutely nothing to call for this exacting supervision.

With all due respect, it is submitted that the evident effect of this decision, if sustained, is that the company is made an insurer of a person who is injured on a station ground, when the carrier has done all that the highest degree of prudence could dictate, and that the act of the company's agent in issuing a railroad ticket is tantamount to issuing a policy of insurance without conditions or limitations.

Respectfully submitted,

J. W. MCKINLEY,
R. C. GORTNER,

Attorneys for Plaintiff in Error.

FRANK MCGOWAN,
Of Counsel.

United States
Circuit Court of Appeals
For the Ninth Circuit.

JOHN B. STEVENS & COMPANY, a Corporation,
Plaintiff in Error,
vs.

THE FRANKFORT MARINE, ACCIDENT & PLATE
GLASS INSURANCE COMPANY, a Corporation,
Defendant in Error,
and

THE FRANKFORT MARINE, ACCIDENT & PLATE
GLASS INSURANCE COMPANY, a Corporation,
Plaintiff in Error,
vs.

JOHN B. STEVENS & COMPANY, a Corporation,
Defendant in Error.

Transcript of Record.

Upon Writs of Error to the United States District Court of
the Western District of Washington, Southern Division.

FILED

APR 15 1913

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Circuit Court of Appeals
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THE FRANKFORT MARINE, ACCIDENT & PLATE
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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Names and Addresses of Attorneys.

L. B. da PONTE, Esquire, Northern Pacific Headquarters Building, Tacoma, Washington,

J. W. QUICK, Esquire, Northern Pacific Headquarters Building, Tacoma, Washington,

Attorneys for John B. Stevens & Company.

ROBERT S. HOLT, Esquire, Tacoma Building, Tacoma, Washington,

U. E. HARMON, Esquire, Tacoma Building, Tacoma, Washington,

HUDSON, HOLT & HARMON, Tacoma Building, Tacoma, Washington,

Attorneys for The Frankfort Marine Accident & Plate Glass Insurance Company.

Stipulation as to Printing.

In the above-entitled action it is hereby stipulated and agreed by and between the parties thereto that in printing the record in this case the clerk shall print:

1. The amended complaint, but shall not print the insurance policy, being Exhibit "A" thereto.

2. Answer to amended complaint.

3. Reply and exhibit thereto.

4. Verdict.

5. Judgment.

6. Motion for judgment *non obstante veredicto*.

7. Bill of exceptions.

8. Order on motion for judgment *non obstante veredicto*.

8 $\frac{1}{2}$. Petitions for writs of errors.

9. Orders allowing the writs of error of both parties.

10. Assignments of errors of both parties.

11. This stipulation as to printing.

12. Stipulation as to the writs of the respective parties and the record and bill of exceptions.

13. Bonds.

That the clerk shall not print the caption or the endorsements on the papers or proceedings, except the filing mark of the Clerk.

L. B. da PONTE,

J. W. QUICK,

Attorneys for Plaintiff, John B. Stevens & Company.

R. S. HOLT,

U. E. HARMON,

HUDSON, HOLT & HARMON, [1*]

Attorneys for Defendant, The Frankfort Marine,
Accident & Plate Glass Insurance Company.

[Endorsed]: "Filed U. S. District Court Western District of Washington. Feb. 27, 1913. Frank L. Crosby, Clerk. By E. C. Ellington, Deputy." [2]

Stipulation as to Exhibit "A," Record, etc.

In the above-entitled action it is hereby stipulated by and between the parties thereto that the insurance policy which is plead as Exhibit "A" to the amended complaint in the action is in the same language and is the same as the insurance policy which is made an exhibit to and a part of the Bill of Exceptions in the action, being referred to in said Bill as Exhibit

*Page-number appearing at foot of page of original certified Record.

“A,” and that the Court may so treat it in the event the said Exhibit “A” to the amended complaint is stipulated not to be printed in the record.

It is further stipulated and agreed that the writ of error of each of the respective parties hereto, if both sue out one, may be heard together on a single record or transcript and on the Bill of Exceptions taken in the case, and that the record and Bill of Exceptions shall be treated as the record and Bill of Exceptions of each of the parties for the purposes of the said writs of error.

It is further stipulated and agreed that the defendant in said action need not take a Bill of Exceptions to the order overruling its motion for judgment *non obstante veredicto*, but that on the hearing of this cause on its writ of error, the record taken up, including the Bill of Exceptions, shall be deemed and treated as sufficient for the purpose of a review by the Circuit Court of Appeals of the correctness of the ruling of the Court on the motion for judgment *non obstante veredicto* and as containing all the testimony and proceedings in the cause necessary for the review of the question. In other words, that the Bill of Exceptions shall be taken and [3] treated as presenting all the evidence and proceedings in said cause material to and bearing on the question of the correctness of the ruling of the Court on the motion for judgment *non obstante veredicto* made by the defendant.

For the purpose of adjusting the costs in the Circuit Court of Appeals, it is stipulated that one-half of the cost of preparing and printing the record, including the Bill of exceptions, shall be taxed as costs

incurred in the writ of error prosecuted by John B. Stevens & Company, plaintiff in error, and the other one-half shall be taxed as costs incurred in the writ of error of the Frankfort Marine, Accident & Plate Glass Insurance Company, defendant in error, on its writ of error, if it sues out one.

It is further stipulated and agreed that the writs of error of the respective parties may be tried and heard together, if they both sue out writs of error, and that The Frankfort Marine, Accident & Plate Glass Insurance Company may, in brief on the writ of error of John B. Stevens & Company, present and discuss the merits of its own writ of error, and that in its reply brief John B. Stevens & Company may incorporate its answer to the brief of The Frankfort Marine, Accident & Plate Glass Insurance Company on its writ of error, and that, if it desires to do so, the said The Frankfort, Marine, Accident & Plate Glass Insurance Company may file a brief strictly in reply to the answer which the said John B. Stevens & Company may make to its brief in its said reply brief.

L. B. da PONTE,

J. W. QUICK,

Attorneys for John B. Stevens & Company, Plaintiff in the Above-entitled Action. [4]

R. S. HOLT,

U. E. HARMON,

HUDSON, HOLT & HARMON,

Attorneys for The Frankfort Marine, Accident & Plate Glass Insurance Company, Defendant in the Above-entitled Action.

[Endorsed]: "Filed U. S. District Court. Western District of Washington. Feb. 27, 1913. Frank L. Crosby, Clerk. By E. C. Ellington, Deputy."
[5]

Amended Complaint.

The amended complaint of the plaintiff, for cause of action against the defendant, alleges:

I.

That plaintiff is a corporation organized under the laws of the State of Washington, and has complied with all of the laws of said State, and has paid its license fee last due, and is licensed to do business in this State, and was at the time of the commencement of this action and at all other times hereinafter referred to.

II.

That defendant is a corporation organized under the laws of the German Empire, with power and authority to do an insurance and indemnity business, and to issue policies or contracts of indemnity indemnifying employers from legal liability and loss on account of personal injuries received by their employees, in consideration of premiums paid therefor.

III.

That on or about the 17th day of November, 1908, in consideration of a premium of \$73.00 paid by plaintiff, defendant executed and delivered to plaintiff a certain contract of insurance or indemnity, wherein and whereby defendant agreed and bound itself to indemnify plaintiff against loss arising from legal liability for damages on account of bodily in-

juries or death suffered by any employee of plaintiff resulting from any and every accident of whatsoever nature or cause happening in, upon or about the premises and in the business of plaintiff, not to exceed, however, the sum of \$5,000.00 for injury or death of any one employee, for the full [6] period of one year from date of said policy, to wit, for the period commencing the 17th day of November, 1908, and ending the 17th day of November, 1909. And said policy further provided that in case of legal proceedings to enforce a claim against plaintiff covered thereby, that defendant would, at its own expense, undertake the defense of the same. And said policy is hereby referred to attached hereto as "Ex. B" and made a part hereof as fully as if set out herein.

IV.

That while said policy was in full force and effect, and on, to wit, July 19, 1909, one I. B. Merrill, an employee of plaintiff, was injured in, upon and about plaintiff's place of business, in the discharge and prosecution of his duties, and said injury was covered by and within the terms of said policy, and plaintiff was and is fully indemnified by the provisions thereof. That subsequently, to wit, on or about the 29th day of October, 1909, said I. B. Merrill commenced an action against plaintiff in the Superior Court of Pierce County, Washington, seeking to recover damages from plaintiff on account of the injuries received in said accident, as will more fully appear from his complaint filed in said cause, a copy whereof is hereto attached and made a part hereof, marked "Ex. A."

V.

Plaintiff further alleges that upon the commencement of said action of I. B. Merrill against John B. Stevens & Company, immediate notice thereof was given to defendant and summons and complaint served therein was delivered to defendant, with request to defend and care for the same as provided by said policy of insurance, but defendant wrongfully and without cause repudiated all liability upon its said contract [7] and refused to accept said accident or to defend the same at its costs unless plaintiff would release it from liability for any judgment that might be rendered therein, and plaintiff was thereby forced to and did defend said action at its own costs, and thereby incurred and paid the reasonable and necessary sum of \$1,072.95. That said action was tried in said court and resulted in a verdict and judgment against plaintiff and in favor of I. B. Merrill in the sum of \$6,000.00 and over, and upon appeal to the Supreme Court of the State of Washington said judgment was affirmed, and thereafter plaintiff was forced to and did pay off and satisfy the same in full, including costs and the sum of \$250.00 interest accruing on said judgment pending appeal, which sum is included in and a part of said sum of \$1,072.95, and said sum, amounting to \$6,072.95, is still due plaintiff from defendant in accordance with the terms and provisions of said policy of insurance.

VI.

Plaintiff further alleges that it duly performed each and everything *thing* required of it by said con-

tract, and fully complied with all the terms thereof, but defendant wrongfully fails and refuses to comply therewith on its part, to plaintiff's damage in the sum of \$6,072.95.

Wherefore plaintiff prays judgment against defendant in the sum of \$6,072.95, interest and costs.

L. B. da PONTE,
Attorney for Plaintiff.

State of Washington,
County of Pierce.

John B. Stevens, being sworn, says that he is [8] president of plaintiff corporation and authorized to make this affidavit; that he has read the foregoing complaint and the same is true.

JOHN B. STEVENS.

Subscribed and sworn to before me the 20th day of July, 1911.

W. H. MOORE,
Notary Public, Pierce County, Washington. [9]

Exhibit "A."

"In the Superior Court of Washington for Pierce County.

I. B. MERRILL,

Plaintiff,

vs.

JOHN B. STEVENS & CO., a Corporation, Defendant.

COMPLAINT.

Comes now the plaintiff, I. B. Merrill, and for cause of action alleges as follows:

1.

That the defendant is a corporation organized under the laws of the State of Washington.

2.

That on and prior to July 19th, 1909, plaintiff had been and was in the employ of the defendant, John B. Stevens Co., running certain machines situated in its warehouse building on the east side of the city waterway in Tacoma Harbor, Pierce County, Washington.

3.

That on or about July 19th, 1909, plaintiff was ordered by the general foreman in charge of all parts of plaintiff's plant to go and assist in unloading a car of loose grain, which was to be done by means of certain hoppers and screw elevators and appliances furnished by defendant for that purpose.

4.

That while plaintiff was so engaged in said work plaintiff was ordered by said general foreman to shut off the supply of grain coming from said car. That in obeying said order plaintiff moved the lever shutting off the supply of [10] grain from the car to the hopper, and in order to do so it was necessary for plaintiff to reach said car, and the only means provided for doing so was by stepping upon the framework of said hopper.

5.

That as plaintiff stepped upon the framework of said hopper for said purpose the same broke and gave way and plaintiff was precipitated to the ground between the car and the platform, striking heavily in the fall upon plaintiff's right side and back upon cer-

tain parts of the framework of said hopper.

6.

That said framework broke and gave way by reason of being negligently and insecurely fastened and nailed, and by reason of it being inadequately constructed for the purpose for which it was used. That the manner in which plaintiff stepped upon the framework of said hopper for the purpose of shutting off the supply of grain from the car was the usual method used by the employees of defendant for said purpose, and was the only way provided whereby said grain could be shut off, and plaintiff was using due care.

7.

That said framework of said hopper upon which plaintiff was required to step on for said purpose consisted of a board about one inch thick and twelve inches wide, nailed to a horizontal position on the frame of said hopper; that said board was secured to said frame by about four nails, two in either end of said board, one in either end near the lower edge of the same and one in either end near the middle of said board, and the upper part of said board was not nailed or secured [11] in any way to said hopper frame, and as plaintiff stepped upon said frame for said purpose said board split at about the point where it was nailed near the center of its width and threw plaintiff's feet outward and toward the left, throwing plaintiff's right side and back against and across the remaining parts of said hopper frame.

8.

That said board was carelessly, negligently and in-

securely fastened, and its manner of construction and fastening was well known, and should have been known, to said general foreman of defendant, but was entirely unknown to plaintiff, and was not of such nature or so apparent that plaintiff could or should have noticed its condition while engaged in his work.

9.

That by reason of the careless and negligent manner in which said framework around said hopper was constructed, and by reason of the same breaking and giving way with plaintiff as herein alleged, and by reason of the fall by plaintiff received, plaintiff sustained great and permanent injuries as follows: Plaintiff was badly bruised and strained and rendered sick, sore and lame; and plaintiff's right kidney was bruised and maimed to such an extent that it had to be and was permanently removed; and plaintiff was thereby entirely incapacitated from performing work and labor; and plaintiff's back is weak and sore, and plaintiff is advised and believes that he will never more be able to perform his accustomed ordinary work and labor; and that plaintiff is entirely incapacitated from performing any work and labor, and will be so incapacitated for a period of one year, and that after the expiration of one year plaintiff will only be able to perform the [12] lightest, easiest kind of work; and plaintiff alleges that he is severely and permanently injured.

10.

That by reason of the injuries by plaintiff received as herein alleged, plaintiff was put to great expense

for medical and surgical treatment, medicines and nursing.

11.

That plaintiff is of the age of 41 years, and prior to said accident was capable of earning, and was earning, about eighteen dollars per week (\$18.00).

12.

That by reason of the premises plaintiff has been damaged in the sum of ten thousand dollars (\$10,000), no part of which he has been paid except the sum of \$63.00.

Wherefore plaintiff demands judgment for the sum of \$9,947.00, together with his costs in this action sustained.

(Signed) FITCH & JACOBS,
Attorneys for Plaintiff."

Verified by I. B. MERRILL.

[Endorsed]: "Filed U. S. Circuit Court, Western District of Washington. Aug. 4, 1911. Saml. D. Bridges, Clerk." [13]

Answer to Amended Complaint.

Comes now the defendant in the above-entitled action, and for answer to the amended complaint of the plaintiff therein—

I.

Answering paragraph III thereof, defendant denies that for the consideration therein referred to, it executed and delivered to plaintiff a contract of insurance, or indemnity, whereby it agreed and bound itself to indemnify plaintiff in the manner set forth in the said paragraph, and whereby it agreed

to undertake, at its own cost, the defense of the legal proceedings to enforce a claim against the plaintiff in the manner set forth in the said paragraph; but defendant alleges that the said contract of insurance, or indemnity, provided, as a condition precedent to its indemnifying plaintiff against the said loss arising from legal liability, as well as the defense of the legal proceedings, therein referred to, at its own expense, that the plaintiff, upon the occurrence of an accident, whether any claim was made with respect thereto or not, would immediately, and at the latest within ten days, give notice of said accident in writing to this defendant, as provided in said policy, and as set forth in clause II, on page I, of Exhibit "B" to the said complaint.

II.

Answering paragraph IV of said complaint, defendant denies that one I. B. Merrill, an employee of plaintiff, was injured on July 19, 1909, and as to the other allegations in the said paragraph, defendant denies any knowledge or information [14] thereof sufficient to form a belief as to the truth of them, and each of them, except that it denies positively that the plaintiff was, or is, fully, or otherwise indemnified by the provisions of the policy therein referred to;

III.

Answering paragraph V of the said complaint, defendant denies that, upon the commencement of the action of I. B. Merrill vs. John B. Stevens & Company, immediate notice thereof was given to this defendant, and it denies that it wrongfully or with-

out cause repudiated liability upon the said contract, but it admits that the summons and complaint, therein referred to, were delivered to it, and it admits that it refused to accept the accident, or to defend the said action, unless the plaintiff would release it from liability for any judgment that might be rendered therein, and as to the other allegations in the said paragraph contained, defendant denies any knowledge or information thereof sufficient to form a belief as to the truth of them, and each of them, except it denies positively that the sum of Six Thousand, Seventy-two and 95/100 Dollars, or any other sum, is due to the plaintiff from it, in accordance with the terms and provisions of said policy, or otherwise.

IV.

Answering paragraph VI of said complaint, defendant denies each and every the allegations therein contained.

AND FOR A FURTHER ANSWER to plaintiff's complaint, and as a FIRST AFFIRMATIVE DEFENSE THERETO, defendant alleges,—

That the policy, or contract, or insurance, or indemnity referred to in plaintiff's amended complaint, was issued to [15] the said plaintiff in the State of Washington, and that the said I. B. Merrill, referred to in the said complaint, received the injuries therein referred to on or about the 15th day of June, 1909, and that the said plaintiff well knew that he had received the said injuries, but that, notwithstanding such knowledge, the said plaintiff did not give notice of the said injury or the

accident from which it arose, in writing or otherwise, to this defendant, or to its duly authorized representative for the locality in which the said contract was issued until the latter part of October, or the first part of November following the said accident and injury, and for this reason this defendant refused to undertake the defense of the action referred to in plaintiff's complaint, and denied any liability to the plaintiff under the said policy, or contract, on account of the said failure to file said notice, the giving of the said notice being made a condition precedent, by the terms of said contract of insurance, to any obligation on the part of this defendant to either defend the suit referred to in plaintiff's complaint, or to any liability under the said contract of insurance for any loss or damage sustained by the said plaintiff on account of the said accident and injury and its legal liability for damages therefor.

AND FOR A FURTHER ANSWER to plaintiff's complaint, and as a SECOND AFFIRMATIVE DEFENSE THERETO, defendant alleges,—

That the contract of insurance or indemnity, referred to in plaintiff's amended complaint, was issued to the plaintiff in the State of Washington, and that thereafter, and on or about the 15th day of June, 1911, the I. B. Merrill referred to in said complaint met with an accident and sustained the [16] injuries referred to in said complaint, as the plaintiff well knew at the time thereof; but that the said plaintiff, notwithstanding the said accident and the said knowledge, failed to give to this defendant no-

tice, in writing or otherwise, of the said accident or injury, and failed to give any such notice to its authorized representative in the locality where the said policy or contract was issued until the latter part of October, or in the first part of November following the said accident and injury, and that, by reason of the failure of the said plaintiff to give the said notice, and its failure to investigate the accident, and to preserve the testimony, the evidence became destroyed and the witnesses scattered, and, at the time the action referred to in plaintiff's complaint was brought, by reason of the neglect of the plaintiff to properly attend to the matter and by reason of certain changes and alterations that it had made in the structure at which the accident occurred, it was no longer possible to successfully defend the said action.

AND NOW, HAVING FULLY ANSWERED, defendant prays to be hence dismissed, with its costs and disbursements in this behalf expended.

HUDSON, HOLT & HARMON,
Attorneys for Defendant. [17]

United States of America,
Western District of Washington,
State of Washington,
County of Pierce,—ss.

R. S. Holt, being first duly sworn, states on oath that he is one of the attorneys for the defendant in the above-entitled action; that he has read the above and foregoing answer, knows the contents thereof and believes the same to be true; that affiant makes this affidavit as attorney for defendant, for the rea-

son that all the material allegations of the said answer are within his personal knowledge.

R. S. HOLT.

Subscribed and sworn to before me this 31 day of July, 1911.

[Notarial Seal]

U. E. HARMON,

Notary Public in and for Said County and State,
Residing at Tacoma, Washington.

[Endorsed]: "Filed U. S. Circuit Court, Western District of Washington. Sep. 14, 1911. Saml. D. Bridges, Clerk." [18]

Reply to Answer to Amended Complaint.

Comes now the plaintiff and makes reply to defendant's answer to plaintiff's amended complaint as follows:

I.

Replying to paragraph "II" of said answer, plaintiff alleges that in said original action of I. B. Merrill vs. John B. Stevens & Company it is alleged in plaintiff's complaint that said accident for which said suit was brought happened on the 19th day of July, 1909, as appears from the complaint therein attached to plaintiff's amended complaint, and said allegation was put in issue by the answer filed therein, as appears from said answer, a copy whereof is hereto attached, marked "Ex. A." That one of the issues tried and determined in said cause and found out passed upon as a basis for the judgment rendered in said suit of I. B. Merrill vs. John B. Stevens & Co. was whether said accident occurred on

the 19th day of July, 1909, or on or about the 15th day of June, 1909, and said issue was determined against this plaintiff, defendant in said suit of I. B. Merrill, and it was adjudicated that said accident happened on said 19th day of July, 1909, and said finding and judgment is conclusive on the parties hereto, and plaintiff now pleads the same as *res adjudicata* of the issue now sought to be raised by defendant as to the date of said accident. [19]

II.

Replying to defendant's first affirmative defense, plaintiff admits that the policy was issued in the State of Washington, but as to the allegation that said accident happened on or about the 15th day of June, 1909, plaintiff here adopts the plea of *res adjudicata* stated in paragraph "I" of this reply. Plaintiff denies that it knew of the injuries or accident to the said I. B. Merrill on or about the 15th day of June, 1909, or at any time prior to the 19th day of October, 1909, but admits that it gave no notice of said accident prior to said 19th day of October, 1909, and alleges that it had no notice or knowledge whatever of the accident or injury to the said I. B. Merrill until the 19th or 20th day of October, 1909, and immediately upon learning thereof and on the said 19th or 20th day of October, 1909, it gave due notice to defendant's duly authorized representative for the locality in which said contract was issued in writing, and defendant never at any time made objection to the form or sufficiency of said notice, except only that defendant pretended that same was not given in time, as required by the terms of said

contract of insurance, and plaintiff admits that defendant declined to admit liability for said accident, giving as reasons therefor the failure of plaintiff to give immediate notice of said accident, as required by said contract. And for further reply to said first affirmative defense, plaintiff alleges that said policy provided "that upon the occurrence of an accident the insured shall immediately, and at the latest within ten days give notice in writing of such accident," etc., and it was impossible for plaintiff to comply therewith, for the reason that it had no knowledge of said accident [20] until long after the time said provision required notice to be given thereof.

III.

Replying to defendant's second affirmative defense, plaintiff here adopts the reply to defendant's first affirmative defense stated in paragraph "II" of this reply. And further replying thereto, plaintiff denies that by reason of its failure to give notice and investigate the accident, the evidence became destroyed and the witnesses scattered, and by reason of certain alterations made in the structure at which the accident occurred, it was no longer possible to defend said action. But plaintiff admits that there was an alteration made in said structure, but alleges that the same was slight and immaterial and in no way prejudicial to the defense of said case, and said alteration was made prior to the time that plaintiff knew of said accident or that said structure was claimed by said I. B. Merrill to have been responsible therefor or connected therewith in any way.

And plaintiff alleges that said structure was totally destroyed by fire without its fault long prior to the time said suit of Merrill was or could have been tried, and in any event could not have been available for use as evidence therein.

Wherefore plaintiff prays as in its complaint.

L. B. Da PONTE,

Attorney for Plaintiff. [21]

State of Washington,

County of Pierce.

John B. Stevens, being sworn, says he is acquainted with the foregoing reply, and the matters and things therein stated are true.

JNO. B. STEVENS.

Sworn to and subscribed before me the 1st day of August, 1911.

F. M. HARSHBERGER,

Notary Public, Pierce Co., Wash. [22]

EXHIBIT "A."

*In the Superior Court of the State of Washington,
in and for the County of Pierce.*

No. —.

I. B. MERRILL,

Plaintiff,

vs.

JOHN B. STEVENS & COMPANY, a Corporation,
Defendant.

ANSWER.

Comes now the defendant in the above-entitled action and in answer to plaintiff's complaint therein,—

I.

Defendant admits that at the time referred to in paragraph numbered 2 of plaintiff's complaint, he, the said plaintiff, had been and was in the employ of this defendant, running certain machines situate in its warehouse, but it alleges in this connection that the running of the said machines was only one of the duties which plaintiff was employed to perform, and that among his duties was that of assisting in the unloading of grain from the cars to the elevators in defendant's warehouse.

II.

Defendant denies each and every the allegations contained in paragraph numbered 4 of said complaint, except it admits that the plaintiff moved the lever shutting off the supply of grain from the hopper to the screw.

III.

Defendant denies each and every the allegations contained in paragraphs numbered 3, 5, 6, 7, and 8 in said complaint contained.

IV.

Answering paragraph 9 of said complaint, defendant denies that the plaintiff sustained great or permanent or any injuries by reason of the careless or negligent manner in which the framework around the hopper referred to in said paragraph was constructed, or by reason of the said framework breaking or giving way with plaintiff; and as to the other allegations in the said paragraph numbered 9 contained, defendant denies any knowledge or information thereof sufficient to form a belief as to the truth of them and each of them.

V.

Defendant denies any knowledge or information thereof sufficient to form a belief as to the truth of the allegations and each of them, contained in paragraphs numbered 10 and 11 of said complaint, except it admits that plaintiff was earning about eighteen dollars (\$18) per week at the time therein referred to. [23]

VI.

Defendant denies the allegations, and each of them, contained in paragraph numbered 12 of said complaint.

AND FOR FURTHER ANSWER to plaintiff's complaint, and as a first affirmative defense thereto, defendant alleges:

That the risks and the dangers of performing the work which plaintiff was performing at the time of his alleged injury, in the manner in which he was then performing the same, were open, patent and obvious to plaintiff, and were well known to him, or in the exercise of ordinary prudence and care should have been known to him.

And for further answer to plaintiff's complaint, and as a second affirmative defense thereto, defendant alleges:

That at the time of the alleged injuries to plaintiff referred to in his complaint, as was well known to the said plaintiff, there was a safe way in which he might have performed the work in which he was then engaged, as well as an unsafe way, but that with the said knowledge, the said plaintiff voluntarily elected to perform the said work in the un-

safe way, and while so doing he was injured, and the injuries so received by him are the same injuries referred to in his complaint.

And for further answer to plaintiff's complaint, and as a third affirmative defense thereto, defendant alleges:

That the said plaintiff, at the time of his alleged injuries, negligently, carelessly and unnecessarily placed himself in a dangerous position where he was likely to slip and fall, and while in the said position he did slip and fall, and was thereby injured, and the injury so received is the same pretended injury referred to in his complaint.

And now having fully answered, defendant prays to be hence dismissed, with its costs and disbursements in its behalf expended.

(Signed) HUDSON & HOLT,
Attorneys for Defendant.

[Endorsed]: "Filed U. S. Circuit Court, Western District of Washington. Aug. 4, 1911. Saml. D. Bridges, Clerk." [24]

Verdict.

We, the jury in the above-entitled cause, find for the plaintiff and assess its damages at the sum of \$286.40 *Dollars*.

ANDY HILBURGER,
Foreman.

[Endorsed]: "Filed U. S. District Court, Western District of Washington. Jan. 3, 1913. Frank L. Crosby, Clerk. By E. C. Ellington, Deputy." [25]

Judgment.

BE IT REMEMBERED that this cause came on to be heard before the Court and jury on the 3d day of January, 1913, and plaintiff and defendant appeared and announced ready for trial.

Thereupon a jury was duly empaneled and sworn to try the issues, and counsel for plaintiff made his opening statement to the jury of the matters and things plaintiff expected to prove.

Thereupon defendant moved the Court to direct a verdict in its favor upon said opening statement, and said motion having been fully argued by counsel and considered by the Court, the Court announced that said motion should be denied, but that in his view of the law plaintiff was only entitled to recover the costs paid by him in defending the Merrill suit in the Superior Court, and was entitled to no other relief, to which ruling both parties excepted and exceptions were allowed.

Thereupon the trial proceeded and the Court submitted to the jury the issue with respect to the amount paid by plaintiff in defense of said suit of I. B. Merrill in the Superior Court, and instructed the jury that they should not allow in any event more than said sum, which it was agreed by the parties amounted to \$286.40, and thereupon the jury retired to consider their verdict, and thereafter brought in a verdict in favor of plaintiff and against defendant in the sum of \$286.40. [26]

It is therefore Ordered, Adjudged and Decreed by the Court that plaintiff do have and recover of and

from the defendant said sum of \$286.40, and plaintiff's cause of action for the sum of \$5,000.00, amount of claim by reason of the judgment rendered and paid by plaintiff in the said Merrill suit, as well as the costs paid by plaintiff for the appeal of the said Merrill suit, be and the same is hereby dismissed with prejudice.

And to so much of said judgment as denied recovery by plaintiff for said sum of \$5,000.00, interest thereon and costs of the appeal to the Supreme Court, plaintiff duly excepted and its exception is allowed, and defendant duly excepted and is allowed an exception to so much of this judgment as allowed to recover against it in the sum of \$286.40, and costs of this action.

Upon application of plaintiff in open court and stipulation of the parties, it is hereby ordered that plaintiff have thirty (30) days from the date of this judgment in which to file and settle a bill of exceptions herein.

Dated this 4th day of January, 1913.

EDWARD E. CUSHMAN,

Judge.

O. K. as to form.

R. S. HOLT.

[Endorsed]: "Filed U. S. District Court, Western District of Washington. Jan. 4, 1913. Frank L. Crosby, Clerk. By E. C. Ellington, Deputy."
[27]

Motion for Judgment Non Obstante Veredicto.

Comes now the defendant in the above-entitled action and moves the Court for judgment in said action in its favor notwithstanding the verdict of the jury, for the following reasons:

I.

By the pleadings an immaterial issue was presented and the defendant was entitled to judgment thereon because it affirmatively appeared therefrom that notice was not given by the plaintiff within ten days after the date of the accident, as required by the policy, and no excuse for a failure to give the said notice was shown thereby.

II.

For the reason that the evidence in the case was confined by the Court to evidence with respect to the expenses incurred by plaintiff in defending the case of I. B. Merrill against it in the Superior Court of Pierce County, Washington, and plaintiff was not entitled to recover these expenses for the reason that its right to recovery depended on its compliance with the requirement of the provision of the policy on which the action is based, requiring it to give notice within ten days after the date of the accident, which, as appears from the pleadings, the admissions and the evidence, it did not do, and for the failure to do which it had no valid excuse.

III.

Because the evidence in the case showed that the plaintiff had failed to comply with the requirement of the [28] provision of the policy on which its

action is based, requiring it to give notice of the accident within ten days, and it appeared affirmatively from the pleadings and the evidence in the case, and the admissions, that no such notice was given, and defendant asked the Court for a peremptory instruction instructing the jury to find a verdict in its behalf with respect to said subject.

This motion is based on the pleadings and other proceedings in the cause, on the opening statement of counsel for the plaintiff, and on the testimony in the case.

R. S. HOLT,
U. E. HARMON,
HUDSON, HOLT & HARMON,
Attorneys for Defendant.

Due service of the within and foregoing motion for judgment *non obstante veredicto*, by receipt of a true copy thereof, is hereby admitted this —— day of February, 1913, and it is agreed that it may be taken up and presented without further notice to us.

L. B. da PONTE,
J. W. QUICK,
Attorneys for Plaintiff.

[Endorsed]: “Filed U. S. District Court, Western District of Washington. Feb. 8, 1913. Frank L. Crosby, Clerk. By E. C. Ellington, Deputy.” [29]

**Order Overruling Motion for Judgment Non
Obstante Veredicto.**

This day, by consent of both parties, there came on regularly for hearing the motion of the defendant

in the above-entitled action for an order for judgment, notwithstanding the verdict of the jury in the above-entitled action, and the Court having fully heard and considered the same, and being of the opinion that the said motion should be denied,—

IT IS THEREFORE ORDERED that the said motion for judgment *non obstante veredicto* be, and the same is hereby overruled and denied, to which the said defendant then and there excepted and had its exception allowed.

Ordered this 15th day of February, 1913, as of Feb. 6th, 1913.

EDWARD E. CUSHMAN,
Judge.

O. K.—J. W. QUICK.

[Endorsed]: “Filed U. S. District Court, Western District of Washington. Feb. 8, 1913. Frank L. Crosby, Clerk. By E. C. Ellington, Deputy.” [30]

Bill of Exceptions.

BE IT REMEMBERED that the above-entitled cause came on duly and regularly to be heard on the 3d day of January, 1913, in this court, before the Honorable Edward E. Cushman, Judge, and a jury, the plaintiff being represented by its attorneys, J. W. Quick and L. B. da Ponte, and the defendant being represented by its attorneys, Messrs. Hudson, Holt & Harmon, and thereupon the following proceedings were had, to wit:

The jury being duly empanelled and sworn, Mr. da Ponte, counsel for plaintiff, made the opening statement to the jury as follows, to wit:

[Statement of Counsel for Plaintiff to Jury, etc.]

“Gentlemen of the Jury:

This suit is an action upon an employer's liability policy, the plaintiff being engaged in the feed business and having in his warehouse machinery with which he compresses and bales and puts up feed; that it is necessary to use machinery, and this machinery, as we all know, is more or less dangerous to the men who have to work around it. It has been discovered that employees engaged in working around moving machinery will be injured from time to time in spite of all care and protection which the owner may take to guard them from danger. So that in order to protect an industry from an overwhelming loss these indemnity companies have been organized, and for a certain premium they will insure an employer up to a certain amount, in this case, five thousand dollars, against liability for injuries to their employees, and then no particular industry is perhaps overwhelmed or wiped out of existence, possibly, by some misfortune of this kind. [31]

In this case the plaintiff had an insurance policy which indemnified it up to \$5,000 for injuries received by employees in its service. In June or July of 1909, Mr. Merrill, an employee, was injured while, as he claimed, stepping across from the platform of the warehouse to a car loaded with grain, for the purpose of shutting off the grain from the car as it ran into the hopper. He alleges that he stepped on the hopper from the platform, and that it broke and precipitated him to the ground, through which he received a severe injury. But he did not realize at

that time that he was seriously hurt, and continued to work from the time of the accident, whether in June or July, until the latter part of August, at which time he left and went to the hospital, and it was found he had dislocated or broken a kidney, and he was forced to undergo an operation and the kidney was removed. Then about the 19th of October he employed counsel to represent him in his claim, and they served notice, or a letter, upon Mr. Stevens, notifying him that Mr. Merrill was injured while in their service and employ and through their negligence. Mr. Stevens turned over this notice to the insurance company, the defendant here, with the request that they defend the action, as obligated by their policy, but the insurance company refused to do so, stating that they had not been notified of the accident within, immediately after, or at the latest within ten days after the accident occurred. They declined, and Mr. Stevens was forced to defend the action, and employed Hudson, Holt & Harmon, Mr. Holt here, to defend him in this suit, and the case was tried and resulted in judgment against Mr. Stevens in favor of Mr. Merrill for a little more than six thousand dollars. The case was appealed to the Supreme Court and the judgment was affirmed by that Court, and thereupon [32] Mr. Stevens satisfied the judgment in full, including costs, the total amount paid being something over seven thousand dollars. We claim here, however, only five thousand dollars, because the policy only insured for five thousand dollars, together with the costs of defending the action, which amount to about one thousand dollars,

or twelve hundred dollars and interest. There is no dispute as to the facts which I have stated, but the insurance company defends on the sole ground that the notice was not given as provided in this clause of the policy:

“That upon the occurrence of an accident, whether any claim be made in respect thereof or not, the assured shall immediately and at the latest within ten days, or within the time fixed for giving notice of accident under liability insurance policies by any statute law of a State in which the policy is issued, give notice in writing of such accident to the company addressed to the manager for the United States at the office of the company in New York, or to the duly authorized representative for the locality in which this policy is issued. If thereafter the assured shall receive notice of any claim arising out of the accident duly reported to the company as above provided, or of any legal proceedings to enforce said claim, he shall within three days’ notice to the company in like manner, and shall forward to the company every summons and process as soon as the same shall have been served on him.”

There is no issue here but that the plaintiff complied with all of the provisions of this paragraph, except that notice was not given immediately, or within ten days after the accident occurred. We have pleaded as an excuse why that notice was not given that the accident to Merrill was not known to have occurred. We will expect to show that neither Mr. Stevens nor [33] Mr. Moore knew anything about any accident to Merrill until they received the

notice from Fitch & Jacobs, attorneys for Merrill, which was served on them October 19th, several months after the accident, and that as soon as they learned of the accident they notified the insurance company.

We contend that although, even if it be a fact, as Mr. Holt will contend, that some subordinate employees around the building may have known something or some circumstance connected with the accident, that is wholly insufficient, and that it was never reported to Mr. Stevens or Mr. Moore, or to anyone who had any knowledge of the policy, or had anything to do, so far as this plaintiff corporation is concerned, with giving the notice. And if the plaintiff is able to prove that it gave notice as soon as it received the notice itself, that the policy was fully complied with. Especially do we contend that in view of the further proposition which will be presented, that is, whether the insurance company was prejudiced in any way by the failure to get the notice sooner. It is our contention that even if it be practically admitted, as they contend, that the mere omission to give notice is not an excuse or justification for their refusal to comply with the written obligation, unless they can show they were injured in some way. Mr. Holt alleges in his answer that—

Mr. HOLT.—It seems to me that this is rather in the way of an argument rather than an opening statement, and I would object to it.

The COURT.—Counsel will confine his statement to what is expected to be proved.

Mr. da PONTE.—They contend that the witnesses

became scattered, due to the failure to give this notice, and [34] that some alterations were made in the structure, and that therefore they were prejudiced, and the suit of Merrill could not successfully be defended. We will expect to show that so far from that being the case, that at the time we gave them notice, every single witness to the accident was down there at the warehouse the same as at the time the accident happened; and that at the trial of the Merrill case every single witness appeared in court and testified, except one, and he had left the country before the case came to trial, but after the insurance company was duly notified that this accident occurred and that they would be expected to handle it.

So far as the change in the structure which is pleaded, we will show that Mr. Merrill never told anybody or claimed to anybody around the premises that this hopper had anything to do with causing his accident, or that the plank or hopper were broken, until long after the accident, in November, and that there was a slight alteration made for the purposes of the business in this hopper, but that it was in no way prejudicial because before the case came to trial and before they could have used it, the entire place was burned up and destroyed by fire, without the fault of Stevens. Our contention is that it is a simple and mere technicality upon which they are seeking to escape their just obligations; that is our contention, and if we prove that, under the Court's instructions we will expect a verdict.

I should have stated, also, that as soon as the summons and complaint were served, they were turned

over to the defendant here, and they refused to handle the case.

Mr. HOLT.—“Under the pleadings in this case there is a flat allegation of compliance and notice. I understand, now, [35] from Mr. da Ponte’s opening statement, that he agrees and concedes that as a matter of fact no notice was given until about the 19th or 20th of October, and I now desire to present to the Court a legal question which could not be presented under the pleadings before, and to move the Court for judgment on the opening statement of counsel, following the practice of the Supreme Court of the United States in the Ascanyon case, with which your Honor is familiar.”

“It being now stated affirmatively that although the accident happened in June or July, no notice was given until October, I desire to present the question.

“It was stated that notice was not given because the assured did not know of it, and I desire to present the question that knowledge on the part of the assured cuts no figure.”

The COURT.—“The jury will be excused until two o’clock this afternoon.”

The COURT.—“Mr. Holt, your motion is for an instructed verdict on the statement.”

Mr. HOLT.—“Yes; for judgment upon the opening statement. A nonsuit would be satisfactory.”

Ruling of the Court [on Motion for Instructed Verdict].

The COURT.—“In many contracts it may be that time is not of the essence of the contract unless expressly so provided in the contract, but in a contract of this kind, where the insurance company under-

takes to handle the litigation or undertakes to settle the case, where the specific provision of this kind is contained, it is clear that the liability under the policy does not attach until the judgment has been paid, it will be concluded that it is a condition precedent, even if it were not so provided in section 16 of the policy, as the Court concludes [36] that it is. The limitation of ten days must refer to something, and it is the Court's conclusion it refers to the time of the accident. This policy was prepared by the company, and the Court would strain the language as far as possible, and still keep within the meaning of it, to protect the person insured, but this language is not capable of any other construction in this policy than that it means that notice should be given at the latest within ten days from the accident, not ten days from the time the insured learned of it. The language "Whether claim is made for it or not," is a proviso which throws light on that construction—additional light, and leads the Court to believe that no other meaning was intended.

There is one proposition in the policy which has not been discussed that leads the Court to believe that the motion will have to be denied. The company was not only liable up to the amount of five thousand dollars for loss on account of the injury, but it undertook the defense of the case if one was brought. There are two things which the company undertakes. One to pay any judgment which may be recovered against the assured, and then besides to conduct the defense. There might be some persuasiveness in the argument of counsel if it were not

for sec. 16, which says: "And the special agreements and warranties herein contained shall be construed as conditions precedent to the payment of any loss under this policy. By that it limits conditions precedent to the payment of loss under the policy. Therefore the question would still be open as to the thousand dollars or more that they claim of expenses paid out in defending the case."

Mr. HOLT.—"Can the testimony be limited in the case [37] to that?"

Mr. da PONTE.—"On that point I think we should follow the common practice and submit all the testimony to the jury, and then the Court can control it on motion for judgment notwithstanding."

The COURT.—"I think you can protect yourself by making offers of proof. I think the case should be tried on what the Court considers the law to be, and if Mr. Holt objects to any testimony from what has been indicated, I will have to sustain the objection."

Exception allowed to both parties.

[Testimony of John B. Stevens, for Plaintiff.]

JOHN B. STEVENS, a witness called by plaintiff, having been sworn, testified:

My name is John B. Stevens. I am the president and manager of the plaintiff company, and Mr. Moore and myself are in active charge of the business of the company. The business of the company is wholesale hay and grain.

The company took out a policy of insurance with the defendant, and the premium on the policy has been paid.

(Testimony of John B. Stevens.)

This is the policy. The policy was received in evidence and marked Plaintiff's Exhibit "A."

An accident occurred during the period covered by the policy, and an action was brought to recover damages therefor.

Q. "Will you please state when you first heard or knew of that accident?"

Mr. HOLT.—"I object to that as irrelevant and immaterial."

The COURT.—"Objection sustained." Plaintiff excepted and its exception was allowed. [38]

Suit was brought against John B. Stevens & Co. about the 1st of November, 1909, but before commencing the suit we got a letter or notice from Fitch & Jacobs, attorneys for Merrill. This is the letter.

Letter offered in evidence.

Mr. HOLT.—"Without waiving any objections to the relevancy and competency of the letter, I do waive all proof as to the genuineness of it."

Letter received and marked Exhibit "B."

Q. "State whether or not you had any notice or knowledge of that accident or that it was claimed to have occurred on your premises until you got that letter. A. No, sir."

Mr. HOLT.—"I object and move that the answer may be stricken as incompetent and immaterial."

The COURT.—"The answer may be stricken."

Mr. da PONTE.—"The plaintiff excepts, and expects to prove by the witness that this letter of Fitch & Jacobs is the first knowledge that he or any other officer of the plaintiff company had of this accident."

(Testimony of John B. Stevens.)

Mr. HOLT.—“To which the defendant objects as irrelevant and immaterial.”

The COURT.—“Overruled and denied. Exception allowed to plaintiff.”

WITNESS.—It was my business or Mr. Moore's to give notice to the insurance company of an accident. The notice of the accident received from Fitch & Jacobs was sent the same day to Mr. Opie, the agent of the insurance company in this territory and the party from whom we got the policy. [39]

Suit was afterwards brought against us and the summons and complaint were sent to Mr. Ramm, the general agent of the company to whom we had been referred by Mr. Opie, or Mr. Holt, the attorney for the insurance company. It was mailed the same day we got it.”

Mr. HOLT.—“There is no question as to that.”

The insurance company refused to take the case or defend it on the ground that they had not been notified of the time the accident occurred. That was the only ground. I defended the action myself, and it resulted in a judgment against us for \$6,100.00.

“It is stipulated that judgment was rendered on the 10th day of February, 1910, in the Superior Court of the State of Washington in and for Pierce County, against the defendant, John B. Stevens & Company, in favor of I. B. Merrill in the sum of \$6,100.00, together with costs.”

The case was appealed to the Supreme Court of the State and affirmed, and I paid the judgment with a check for \$6,539.30, which includes interest and costs.

(Testimony of John B. Stevens.)

Mr. HOLT.—“We admit it was paid and satisfied.”

I paid as costs of defending the suit in the Superior Court the sum of \$250.00 to Mr. Holt as attorneys' fees.

I paid \$167.60 to Mr. Holt for appealing the case.

Mr. HOLT.—“I object as irrelevant and immaterial.”

The COURT.—“The objection will be sustained as being no part of the expense of the defense.” Exception allowed.

Mr. QUICK.—“In order to make that full and complete, I understand the Court holds the expense of the appeal to the Supreme Court is not a proper item to be recovered.” [40]

The COURT.—“That it is not a part of the defense provided for in the policy.”

WITNESS.—I was advised to appeal the case by counsel. I paid in addition \$10.00 for reporting the trial, and I also paid \$86.00 for copying the evidence for use in the Supreme Court.

Objection to the item incurred on the appeal sustained.

Other costs of the appeal consisting of \$31.50 for printing brief; \$9.75 for reply brief; \$10.00 transcript; \$50.00 paid attorneys for filing a motion for rehearing; \$28.80 for making an oral argument, were all objected to as not being part of the expense of defending the case, and the objections were sustained and an exception taken and allowed.

It is admitted that plaintiff demanded payment of defendant of the sums sued for, and was refused.

In addition to the foregoing items plaintiff sustained expense of witnesses attending court on the trial of the Merrill case, the amount whereof was agreed by the parties to be \$26.40.

Mr. da PONTE.—“I now offer to prove by this witness the facts with respect to the happening of the accident, and that the plaintiff had no notice of it, and that the defendant in any case was not prejudiced by not having notice sooner; that all of the witnesses were available at the time that notice was given to the defendant of the accident.”

Mr. HOLT.—We enter our objection that it is irrelevant and immaterial.

The COURT.—“Objection sustained.” Exception taken and allowed. [41]

Mr. QUICK.—“The plaintiff now offers to prove by the witness, W. H. Moore, that he was secretary of the John B. Stevens Company at the time Mr. Merrill was injured and for several months thereafter, and in charge of the office of the company and the business of the company as transacted at the office, and that he did not know anything about the alleged injury or claim that Mr. Merrill had been injured until the time of receiving the letter of notification from attorneys Fitch & Jacobs, which has been referred to by the witness, Stevens.”

Mr. HOLT.—“I object to that part of the proffered testimony going to show that Mr. Stevens or the company did not know of the accident until the time when the notice was given, as irrelevant and immaterial.”

The COURT.—“Objection sustained and plaintiff

allowed an exception.”

Thereupon plaintiff rested its case, and defendant offered no testimony and rested its case.

The Court thereupon delivered instructions to the jury, and the same are, so far as material, as follows:

[Instructions.]

“Gentlemen of the Jury:

This case, as is disclosed by the pleadings which you will take with you, when you retire, was brought by John B. Stevens & Company against the defendant insurance company to recover under an insurance policy that the defendant company had given the Stevens Company to indemnify it on account of loss on account of injuries sustained by its employees. The policy covered loss up to five thousand dollars on account of any single injury, and also provided that the defendant insurance company would defend any suit brought against the John B. Stevens Company on account of injury received by any of its employees. [42] The complaint alleged that this accident to this man Merrill, on account of whom the suit was brought, happened on the 14th day of July, 1909; and it has been proven and pleaded here that notice was not given to the insurance company of this accident until October following the accident. The policy itself provided that notice must be given within ten days, not later than ten days after the accident, and the Court has ruled that as long as the plaintiff did not give notice, that there could be no recovery against the defendant company on account of the injury itself.

The plaintiff here defended this action itself—

asked the insurance company to defend it, and that company refused so far as this evidence goes, if you believe it, to do so, and then the plaintiff's testimony is that John B. Stevens & Company defended the action. The Court has ruled that while there could be no recovery against the defendant on account of the loss it sustained in paying the judgment which Merrill recovered, because they did not give the ten days' notice, yet that the insurance company undertook to defend that suit regardless of whether the ten days' notice was given, and that it was its duty when called upon to do so without requiring the plaintiff, John B. Stevens & Company, to release it beforehand on account of any judgment that might be obtained. So you will not concern yourselves with that part of the pleading that goes to the liability or claimed liability on account of the judgment which John B. Stevens & Company had to pay in the end. You will confine your attention to the evidence introduced here regarding those costs and expenses which the plaintiff was put to in defending the case in the Superior Court of Pierce County after the defendant company refused to defend for it. [43]

In this case the burden of proof is upon the plaintiff to prove that this policy was given as described here in the complaint, and that there has been a breach of it in the particular that I have pointed out to you, that is, that the defendant company did refuse to carry on, at its own expense, the defense of this case after it was brought. And also before the plaintiff can recover it must show what expense it was put to on account of that breach by the defendant company of this policy in refusing to defend the case.

The plaintiff must show these three things by a preponderance of the evidence before it can recover. Counsel have conceded in Court that the expenses in the Superior Court that plaintiff was occasioned by defending this suit was \$260.00, and for certain witnesses, twelve in number, and the plaintiff would be entitled to recover for its liability to pay those witnesses two dollars a day for the time they attended on the Court, and ten cents a mile for the distance they had to travel, which the plaintiff does not claim was more than two miles, one mile going and one coming. Counsel have also conceded that they do not claim more than one day for the witnesses. \$26.40 is the amount for the witnesses, and \$260.00 for attorneys and court costs, which would make \$286.40 expense that the plaintiff was put to in defending the case after it claims that the defendant refused to defend for it.

You are instructed that as under the law as the Court has settled it you cannot return a verdict for more than \$286.40, because there has been no proof under the issues that the Court has allowed to go to the jury of any damage on account of the breach for any greater amount than that.” [44]

Thereupon the jury retired to consider their verdict, and thereafter returned into court with a verdict in favor of the plaintiff and against the defendant in the sum of \$286.40.

The plaintiff duly excepted to the charge to the jury and to the refusal of the Court to submit the cause to the jury on the issues made by the pleadings and plaintiff's opening statement.

And plaintiff excepted to the Court's charge to the jury that plaintiff could not recover in any event more than \$286.40.

And plaintiff now presents this bill of exceptions, and prays that the same be settled and allowed as a bill of exceptions in this cause.

J. W. QUICK,
L. B. da PONTE,
Attorneys for Plaintiff. [45]

Amendments Allowed to Bill of Exceptions.

Comes now the defendant and proposes the following amendments to the bill of exceptions, viz.:

(1) That when the plaintiff offered to prove the payment of an attorney's fee for the trial of the case of Merrill against Stevens in the Superior Court of Pierce County, defendant objected thereto on the ground that it was irrelevant and immaterial, because there could be no recovery of any kind whatever therefor. The objection was overruled and an exception allowed.

(2) By Mr. Holt, to witness Stevens:

Q. "After the insurance company refused to defend that action you employed me to defend it for you? A. Yes, sir.

Q. Or my firm? A. Yes, sir.

Q. And after you brought this suit, this present action, I declined to defend this case for the insurance company on account of my former connection with it until you addressed to me a letter and told me you had no objections to my doing so; that is true, isn't it? A. Yes, sir."

(3) That after the introduction of all the testimony and before the submission of the cause to the jury, Mr. Holt, attorney for the defendant, moved the Court for a peremptory instruction to the jury to find a verdict in its favor with respect to the attorneys' fees and the costs in the Superior Court, for the reason that there could be no recovery therefor on account of the failure to give notice within ten days, on the theory that this notice applied as well to the defense of the suit as to the payment of the loss arising from the liability, which motion was denied and defendant was allowed an exception. [46]

(4) After the Court had instructed the jury, and before they had returned a verdict in the cause, defendant duly and regularly excepted to the charge of the Court, which instructed the jury that they might return a verdict in favor of plaintiff for the costs incurred by him in defending the suit of Merrill against him in the Superior Court of Pierce County.

H. S. HOLT,

U. E. HARMON,

HUDSON, HOLT & HARMON,

Attorneys for Defendant. [47]

Plaintiff's Exhibit "A—Policy."

Case No. 1739—C.

*United States District Court, Western District of
Washington.*

JOHN B. STEVENS & CO.,

vs.

FRANKFORT MARINE & A. CO.

No. W131817.

Limits \$5,000—\$10,000.00.

Established 1865.

THE FRANKFORT MARINE, ACCIDENT AND
PLATE GLASS INSURANCE COM-
PANY, OF FRANKFORT ON
THE MAIN, GERMANY.

United States Department.

100 William St., New York, N. Y.

C. H. FRANKLIN,

Manager & Attorney.

EMPLOYER'S LIABILITY POLICY.

IN CONSIDERATION of the Warranties herein-
after contained and set forth on the back of this
Policy, and which the Assured makes and warrants
to be true by the acceptance of this Policy, excepting
the statements concerning the number of employees
and their compensation, which are estimated, and of
the payment of SEVENTY-THREE and 00/100
DOLLARS (\$73.00) Estimated Premium, THE
FRANKFORT, MARINE, ACCIDENT AND
PLATE GLASS INSURANCE COMPANY, of
FRANKFORT-ON-THE-MAIN, GERMANY
(hereinafter called the "Company").

DOES HEREBY AGREE TO INDEMNIFY
John B. Stevens Co. of Tacoma, County of Pierce,
State of Washington (herein called the "Assured"),
for the term of one year beginning on the 17th day of
November, 1908, at noon, and ending on the 17th day
of November, 1909, at noon, Standard time, at the
place where this policy has been countersigned.

AGAINST LOSS arising from legal liability for

damages on account of bodily injury or death suffered by any employee or employees of the Assured resulting from any and every accident of whatsoever nature or cause happening in, upon, or about the premises and in the business of the Assured as described on the back hereof; but the liability of the Company in respect to any one employee suffering injury or death shall in no case exceed the sum of FIVE THOUSAND DOLLARS (\$5,000.00), nor, subject to this limit, shall the total liability of the Company in respect to any one accident resulting in injury to, or the death of, several employees, in any event exceed the sum of TEN THOUSAND DOLLARS (\$10,000.00). [48]

IT IS EXPRESSLY WARRANTED AND
AGREED

1. That the Company's liability for accidents caused by or happening about any elevator plant, or caused by the explosion, rupture or collapse of any steam boiler or boilers, is limited to such elevator plant and boilers as are enumerated and described on the back hereof.

2. That upon the occurrence of an accident, whether any claim be made in respect thereof or not, the Assured shall immediately, and at the latest within ten days, or within the time fixed for giving notice of accident under Liability Insurance Policies by any special law of the State in which the policy is issued, give notice in writing of such accident to the Company, addressed to the Manager for the United States, at the office of the Company in New York, N. Y., or to the duly authorized representative

for the locality in which this policy is issued. If thereafter the Assured shall receive notice of any claim arising out of an accident duly reported to the Company as before provided, or of any legal proceedings to enforce such claim, he shall, within three days, give notice thereof to the Company in like manner, and shall forward to the Company every summons and process as soon as the same shall have been served on him.

3. That if any legal proceedings are taken to enforce a claim against the Assured, which would be covered by this policy if the Assured were legally liable in respect to such claim, the Company shall, at its own cost, undertake the defense or settlement of such legal proceedings in the name and on behalf of the Assured, and shall have entire control of such defense, whether legal liability on the part of the Assured in respect to the claim is proven as the result of such proceedings or not. If the Company shall at any time offer to pay to the Assured the full amount for which the Company might be liable to indemnify the Assured in respect to the claim sought to be enforced, it shall not thereafter be bound to defend any legal proceedings nor be liable for any costs or expenses which the Assured may incur in defending the same; but the Company shall not be responsible for any damages alleged to have been sustained by the Assured in consequence of any action or omission of the Company in connection with such claim or proceeding. The Assured shall, at all times, under the direction of the Company, render all reasonable and necessary assistance to enable the

Company to effect settlements or to properly conduct a defense or to prosecute an appeal, or to secure information or the attendance of witnesses.

4. That the Company may undertake at its own cost the settlement of any claim duly reported to it as before provided, and the Assured shall not, except at his own cost, settle any claim nor incur any expense without the consent of the Company thereto previously given in writing, nor admit any liability on account of the accident; provided, however, that at the time of the accident, such immediate surgical relief to the injured may be furnished as may be imperative, and reasonable expenses thus incurred shall be deemed a part of the liability of the Company, if claimed, and if doctors' bills for such [49] actual immediate surgical relief are presented to the Company within six months from the date of the accident.

5. That this policy may be cancelled at any time by written notice, served on or sent by registered letter to the Assured at the address given herein, stating the date when the cancellation shall be effective, which shall be subsequent to the date of the notice. It may be cancelled by the Assured by like notice to the Company. If cancelled by the Company it shall retain a pro rata premium; if cancelled by the Assured, the Company shall, after deducting twenty-five per centum of the whole of the premium for expenses, retain a premium computed according to the customary short rates. (In either case the earned premium shall be computed on the pay-roll for the year, as indicated by the payroll of the As-

sured during the time the policy shall have been in force.) In any case the Company shall receive or retain the minimum premium stated in Clause 6. The Company's check, mailed to the address of the assured as given herein, shall be a sufficient tender, but no return premium shall be payable until a statement of the actual pay-roll of the Assured during the time this policy was in force shall have been furnished to the Company by the Assured.

6. That the premium is based upon the estimated annual pay-roll to be expended by the Assured during the term of this policy. A sworn statement of the actual pay-roll expended by the Assured during the policy period shall be furnished to the Company within thirty days after the expiration of the policy, and this policy shall not cover the liability of the Assured for accidents to any employee whose wages are not included in the estimated pay-roll and in the sworn statement of the actual pay-roll expended. If the pay-roll shall exceed the estimate, the Assured shall pay the Company the additional premium earned within thirty days after the amount shall have been determined, and notice given as Assured. If the actual pay-roll shall be less than the estimate, the Company will return the unearned premium, when determined; provided, however, that the premium to be retained by the Company shall in no event be less than the sum of FIFTY DOLLARS, *dollars*, or the premium for which this policy is issued, if less than Twenty-five Dollars.

7. That the Company shall have the right at all reasonable times to examine the books of the Assured

so far as they relate to the wages paid to employees; and the Assured shall, when so requested, and within ten days of the date of the request, furnish the Company with a sworn statement of the total amount of wages paid to his employees during any period within the term of this policy which may be specified by the Company.

8. That this policy shall not cover any liability which the Assured has assumed, may now or hereafter assume, by contract or otherwise, for loss on account of bodily injuries, fatal or non-fatal, to any employee or employees, except by consent of the Company, evidenced by the endorsement hereon of such consent, signed by the Manager and Attorney for the United States.

9. That if the Assured has any other policy in this Company, in respect of an injury, fatal or non-fatal, covered [50] hereby, the Assured shall elect the policy under which the accident shall be treated; but the Company shall not be held responsible for a liability under more than one policy.

10. That this policy covers the making of such repairs, renovations and alterations as are necessary to maintain the premises, plant, machinery and appliances in good order and safe working condition, but alterations and additions of a structural character are not covered by this policy without the previous consent of the Company obtained thereto in writing.

11. That this policy shall not apply to or cover any injury suffered by any person, young person or child employed by the Assured contrary to law, nor

to any child under fourteen years of age where no statute restricts the age of employment, nor to any injury suffered by others caused by the act of any such person, young person or child employed by the Assured contrary to law.

12. That any assignment of interest under this policy be void, unless the written consent of the Company is endorsed hereon by the United States Manager.

13. That if the Assured carry the policy of another insurer, whether valid or not, against a claim covered by this policy, he shall not be entitled to recover a larger proportion of the loss than the sum hereby insured bears to the whole amount of insurance applicable to such claim.

14. That in case of loss under this policy, the Company shall be subrogated to all claims or rights of the Assured in respect to such loss against any person or persons, and the Assured shall execute any and all papers required to secure to the Company such rights.

15. That an agent has no authority to change this policy or to waive any of its provisions, nor shall notice to any agent, or his knowledge or that of any other person, be held to effect a waiver or change in this contract or in any part of it. No change whatever in this policy nor waiver of any of its provisions shall be valid unless an endorsement is added hereto, signed by the United States Manager of the Company, expressing such waiver or change.

16. That no action shall lie against the Company recover for any loss under this policy unless it shall

be brought by the Assured for loss actually sustained and paid in money by the Assured in satisfaction of a judgment after trial of the issue; nor unless such action is brought within ninety (90) days after final judgment against the Assured has been so paid and satisfied. The Company does not prejudice by this condition any defenses against such action that it may be entitled to make under this policy, and the special agreements and warranties herein contained shall be construed as conditions precedent to the payment of any loss under this policy.

17. "That this policy shall not cover loss arising from a liability occasioned in whole or in part by the failure of [51] the Assured to comply with the provisions of any labor or factory law or other statute in force during the term of this policy, and providing for the protection of employees; nor any loss arising from liability occasioned by the violation by the Assured of any legal ordinance."

IN WITNESS WHEREOF, THE FRANKFORT MARINE, ACCIDENT AND PLATE GLASS INSURANCE COMPANY, of Frankfort-on-the-Main, Germany, has caused these presents to be signed by its United States Manager and Attorney, but the same shall not be binding upon the Company until countersigned by a duly authorized and commissioned Agent.

C. H. FRANKLIN,

Manager and Attorney for the United States.

Countersigned at Tacoma, Washington, this 17th day of November, 1908.

W. H. OPIE & CO.,

Authorized and Commissioned Agent. [52]

Order No.....
 State Order No.....
 Agency at Tacoma, Wash.....
 New Policy No. W131817.....
 Old Policy No.....
 Estimated.
 Pay-roll, \$10,000, Rate 73¢.....
 PREMIUM \$73.00.....
 Commence Nov. 17th, 1908.....
 Expire Nov. 17th, 1909.....
 Term twelve Months.....
 Expir. Exp. Bordereau El. Reg.....
**THE FRANKFORT, MARINE, ACCIDENT
 AND PLATE GLASS INSURANCE CO., of
 Frankfort-on-the-Main, Germany.**
 United States Department.

100 William St., New York, N. Y.

C. H. FRANKLIN, Manager.

APPLICATION is hereby made for EMPLOYEES' LIABILITY POLICY of Insurance to indemnify the assured against loss not exceeding \$—— in respect to any one Employee in any case nor, subject to this limit, \$—— in respect of any Accident wherein several Employees may be involved.

SCHEDULE OF WARRANTIES.

1. Name and Full Address: John B. Stevens Co.,
West Waterway, Tacoma, Wash.
2. Business is Hay, Straw and Feed Dealers and
the operations are those usual thereto except-
ing ——

3. No motive power is used excepting Electricity for Baling Hay.
4. Explosives or Chemicals are not used, excepting—None.
5. No power presses are used for stamping metal work, excepting—None.
6. There are ONE Boilers of UPRIGHT type; age ——— years. Insured in ——— Company. Policy expires ———, 19——.
7. There are ——— Elevators ——— Pass'gr ——— Freight. [53]
Maker ——— insured in ——— Company. Policy expires ———, 19——.
8. Employers' Liability Insurance is carried in NONE Company for \$——— each Employee. Policy expires ———, 19——.
9. No Company has cancelled or refused to issue liability or boiler insurance to the assured during the past three years, except as follows: None.
10. No Company has insured this risk during the past two years, except as follows: None.
11. Estimated Pay-roll during term of Policy for all employees EXCLUSIVE of offices and office employees is \$10,000.00, and the amount actually paid during preceding 12 months was \$———.

12. SCHEDULE OF EMPLOYEES AND PREMISES OF EMPLOYER.

Description of Employment.	Estimated number.	Estimated Annual Payroll.	Premium Rate per \$100 of Compensation.	Place where Shops, Factories or Yards are Situated.
Handling hay, straw and feed				
Baling hay and warehouse work	12	10,000	73¢	
Employees on hand-fed stamping, punching, cutting and embossing machine—No				
Drivers and drivers' helpers—No				
Sub-contractors and Employees—No				

Complete and accurate pay-roll records will be kept corresponding to the classifications above described. [54]

We agree to pay Seventy-three Dollars (\$73.00) premium on delivery of the Policy, which is to take effect at 12 o'clock noon the 17th day of Nov., 1908, and is to terminate on the 17th day of November, 1908, at 12 o'clock noon Standard Time, at the place where the policy has been countersigned.

Dated November 17th, 1908, at Tacoma, Washington.

JOHN B. STEVENS & CO.,
W. H. MOORE, Secy.,
Applicant.
Sub-Agent or Broker,

General Agent,
W. H. OPIE & Co. [55]

ASSIGNMENT OF INTEREST BY ASSURED.

The interest of ——— covered by this policy is hereby assigned to ——— subject to the consent of the FRANKFORT MARINE, ACCIDENT AND PLATE GLASS INSURANCE COMPANY.

Dated at ———, this — day of ———, 19——.

_____,
(Signature of the Assured.)

Wages estimated for term from ———, 19——, to ———, 19——, \$——.

Wages expended for term from ———, 19——, to ———, 19——, \$——.

Balance ——— \$——.

It being understood and agreed that \$—— is the estimated wage expenditure for the remainder of the term of this policy, viz.: from ———, 19——, to ———, 19——, and the said assignee agreeing to an adjustment as per condition 6 of this policy the FRANKFORT MARINE, ACCIDENT AND PLATE GLASS INSURANCE COMPANY, of Frankfort-on-the-Main, Germany, hereby consents that the interest of ——— covered by this policy be assigned to ———.

Dated at New York, N. Y., this — day of ———, 19——.

_____,
United States Manager and Attorney.

RECEIVED of THE FRANKFORT MARINE, ACCIDENT AND PLATE GLASS INSURANCE COMPANY, of Frankfort-on-the-Main, Germany, ——— dollars Return Premium, in consideration of

which this Policy is hereby cancelled and surrendered to Company.

Assured. [56]

No. W131817.

EMPLOYER'S LIABILITY POLICY
OF
THE FRANKFORT MARINE, ACCIDENT AND
PLATE GLASS INSURANCE COMPANY of
Frankfort-on-the-Main, Germany.

UNITED STATES DEPARTMENT:

TRUSTEES:

Richard Delafield, Pres't of National Park Bank.

Ernst Thalmann, of Ladenburn Thalmann & Co.

Stuyvesant Fish, Pres't of Illinois Central Railroad.

C. H. FRANKLIN,

Manager and Attorney.

100 William Street,

New York, N. Y.

ISSUED to JOHN B. STEVENS CO., Tacoma,
Washington.

Estimated Pay-roll—\$10,000.00.

Premium—\$73.00.

Expires November 17th, 1909.

READ YOUR POLICY.

INSURANCE, REAL ESTATE AND LOAN.

W. H. OPIE & CO.,

306 Equitable Bldg.,

Tacoma, Wash. [57]

[Endorsed]: "Filed U. S. District Court, Western District of Washington, Jan. 3, 1913. Frank L. Crosby, Clerk. F. M. Harshberger, Deputy." [58]

Plaintiff's Exhibit "B."

Case No. 1739—C.

*United States District Court, Western District of
Washington.*

JOHN B. STEVENS & CO.,

vs.

FRANKFORT MARINE ACCIDENT & C. CO.

**COPY OF LETTER RECD. FROM FITCH &
JACOBS.**

Oct. 19, 1909.

John B. Stevens & Co.,

Tacoma, Washington.

Gentlemen:

We represent Mr. I. D. Merrill who was injured on or about July 19th, at your feed mill and warehouse, while in your employ, and thru your negligence.

If you desire to take this matter up with us before action is brought, please do so on or before the 23rd of this month.

Yours truly,

Signed by FITCH & JACOBS.

[Endorsed]: "Filed U. S. District Court, Western District of Washington. Jan. 3, 1913. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy." [59]

Plaintiff's Exhibit "C."

Case No. 1739—C.

*United States District Court, Western District of
Washington.*

JOHN B. STEVENS & CO.,

vs.

FRANKFORT MARINE ACC. etc. CO.

JOHN B. STEVENS & CO. No. 1006.

Hay, Grain and Flour.

Tacoma, Wash., Jan. 19, 1911.

Pay to Hudson & Holt ——— or order \$6539.30
Sixty-five Hundred thirty-nine and ——— 30/100
Dollars.

JOHN B. STEVENS & CO.

W. H. MOORE, Cashier.

To National Bank of Commerce,

Tacoma, Washington.

(Endorsed):

“Pay Fitch & Jacobs, attorneys
for I. B. Merrill, or order.

HUDSON & HOLT.

FITCH & JACOBS,

Attys. for I. S. Merrill.”

(Perforated): “PAID

: 1 : 20 : 11: ”

(Endorsed for filing): “Filed U. S. District Court,
Western District of Washington. Jan. 3, 1913.
Frank L. Crosby, Clerk. By F. M. Harshberger,
Deputy.” [60]

“Plaintiff’s Exhibit “D.”

Case No. 1739—C.

*United States District Court, Western District of
Washington.*

JOHN B. STEVENS & CO.,

vs.

FRANKFORT MARINE, ACCIDENT ETC. CO.

*In the Superior Court of the State of Washington,
for the County of Pierce.*

ABSTRACT OF JUDGMENT.

No. 28904.

I. B. MERRILL,

Plaintiff,

vs.

JOHN B. STEVENS & Co.,

Defendant.

Judgment Debtor, JOHN B. STEVENS & CO.,
and from E. J. McNEELEY and JOHN SNYDER,
as sureties.

Judgment Creditor I. B. MERRILL.

Judgment with interest at 6 per cent, per annum
from Feb. 10, 1910, and costs. . . . \$6100.00 DR.

Int. 347.20

Attorney’s Fee.

Plaintiff’s Costs—Clerk’s Fee,

\$———; Service Fee \$———

Supreme Court Costs. 46.50

Witness Fee, \$———; Attorney's
 Fee, \$———; Misc. Fee \$———.
 Total, \$———.

Superior Court Costs..... 45.60

[61]

Defendant's Costs—Clerk's Fee, \$———; Service,
 \$———; Witness Fee, \$———; Attorney's Fee,
 \$———; Misc. Fee, \$———; Total, ——.

Judgment entered Dept. 2, Journal 131, page 172,
 Jan. 20, 1911.

FITCH & JACOBS,
 Attorneys for Judgment Creditor.

SUPPLEMENTAL PROCEEDINGS.

Date 1911.

Jan. 20. Received sum of \$6539.30 in full
 satisfaction of above judgment,
 costs & interest.

FITCH & JACOBS,
 Attys. for Plaintiff.

1912.

Dec. 31. Abstract Judgment issued..... .70
 State of Washington,
 County of Pierce,—ss.

I, E. F. McKENZIE, County Clerk and ex-officio
 Clerk of the Superior Court of the State of Washing-
 ton, in and for Pierce County, do hereby certify that
 the within and foregoing is a full, true and correct
 Abstract of Judgment in the within entitled action
 as the same appears of record in my office in Execu-
 tion Docket, vol. 26, at page 228.

IN WITNESS WHEREOF, I have hereunto set my hand and the seal of said Superior Court, this 31 day of Dec., 1912.

[Superior Court Seal] E. F. McKENZIE,
Clerk.

By M. E. McNerthney,
Deputy Clerk. [62]

“S A T I S F I E D .

Jan. 20, 1911.

E. F. McKENZIE, Clerk.

By M. E. McNerthney, Deputy.” [63]

No. 28904.

ABSTRACT OF JUDGMENT.

IN THE
SUPERIOR COURT
HOLDING TERMS AT
TACOMA, WASH.
I. B. MERRILL,

Plaintiff,

vs.

JOHN B. STEVENS, et al.,

Defendant, [64]

[Endorsed]: “Filed U. S. District Court, Western District of Washington. Jan. 3, 1913. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy.” [65]

Order Settling Bill of Exceptions.

This cause having come on before the Court on this 3d day of January, 1913, for the settling of a bill of

exceptions and the time for the settling and certifying thereof having been duly extended by order of the Court, and stipulation of the parties until and including this day, and the parties having agreed together with respect to the defendant's proposed amendments, and said amendments having been allowed; and the Court finding that the parties have agreed to said bill of exceptions, and that the same is a full, true and correct bill of exceptions, now, therefore, on motion of L. B. da Ponte and R. S. Holt, attorneys for the plaintiff and defendant, it is ordered that the said proposed bill of exceptions, as amended, together with the exhibits in the case to be attached thereto by the clerk, be and is hereby settled and allowed as the true bill of exceptions in this cause, and that the same be now certified accordingly by the undersigned, the Judge of this court who presided at the trial of this cause, and when so certified that this bill of exceptions be filed by the clerk.

Dated January 3d, 1913.

EDWARD E. CUSHMAN,

Judge.

O. K.—R. S. HOLT.

[Endorsed]: "Filed U. S. District Court, Western District of Washington. Feb. 7, 1913. Frank L. Crosby, Clerk. By E. C. Ellington, Deputy." [66]

[Plaintiff's] Assignment of Errors.

Comes now the plaintiff in error and makes the following assignment of the errors on which it will rely on its writ of error in this cause, viz.:

I.

The Court erred in the ruling on defendant's motion for judgment on the pleadings in holding that there could be no recovery on the policy for the loss sustained by the judgment in the Merrill case.

II.

The Court erred in excluding the testimony sought to be elicited from the witness, Stevens, as follows:

Q. "State whether or not you had any notice or knowledge of that accident or that it was claimed to have occurred on your premises until you got that letter."

A. "No, sir."

Mr. HOLT.—"I object and move that the answer may be stricken as incompetent and immaterial."

The COURT.—"The answer may be stricken."

Mr. da PONTE.—"The plaintiff excepts and expects to prove by the witness that this letter of Fitch & Jacobs is the first knowledge that he or any other officer of the plaintiff company had of this accident."

III.

The Court erred in holding and ruling that the costs of the appeal of the Merrill case were no part of the costs of defending the accident case and could not be recovered. [67]

IV.

The Court erred in rejecting plaintiff's offer of proof as follows:

Mr. da PONTE.—"I now offer to prove by this witness the facts with respect to the happening of this accident, and that the plaintiff had no notice

of it, and that the defendant in any case was not prejudiced by not having notice sooner; that all of the witnesses were available at the time that notice was given to defendant of the accident."

V.

The Court erred in rejecting the following offer of proof, viz.:

Mr. QUICK.—"The plaintiff now offers to prove by the witness, W. H. Moore, that he was secretary of the John B. Stevens Company at the time Mr. Merrill was injured and for several months thereafter, and in charge of the office of the company and the business of the company as transacted at the office, and that he did not know anything about the alleged injury or claim that Mr. Merrill had been injured until the time of receiving the letter of notification from attorneys, Fitch & Jacobs, which has been referred to by the witness, Stevens."

VI.

The Court erred in his charge to the jury as follows, viz.:

"You are instructed that under the law, as the Court has settled it, you cannot return a verdict for more than \$286.40, because there has been no proof under the issues that the Court has allowed to go to the jury of any damage on account of the breach for any greater amount than that."

VII.

The Court erred in his charge in refusing to sub-

mit the cause to the jury on the issues made by the pleadings.

J. W. QUICK,

L. B. da PONTE,

Attorneys for Plaintiff. [68]

[Endorsed]: "Filed U. S. District Court, Western District of Washington. Feb. 8, 1913. Frank L. Crosby, Clerk. By E. C. Ellington, Deputy." [69]

Petition of Plaintiff for Writ of Error.

The plaintiff, John B. Stevens & Company, feeling aggrieved by the judgment entered herein, petitions the Court for an order allowing it to prosecute *it to prosecute* a writ of error to the Honorable United States Circuit Court of Appeals for the Ninth Circuit, and that an order be made fixing the amount of security which plaintiff shall give upon said writ of error, and that the judgment be stayed pending the determination of said writ.

Petitioner presents herewith an assignment of the errors upon which it will rely in said court of appeals.

J. W. QUICK,

L. B. da PONTE,

Attorneys for Plaintiff.

[Endorsed]: "Filed U. S. District Court, Western District of Washington. Feb. 8, 1913. Frank L. Crosby, Clerk. By E. C. Ellington, Deputy." [70]

Order Allowing Plaintiff Writ of Error.

The petition for a writ of error and assignment of errors being filed and presented, it is ordered that a writ of error be allowed to have the final judgment herein reviewed in the Honorable Circuit Court of Appeals of the United States for the Ninth Circuit. The amount of security on said writ of error is hereby fixed in the sum of \$500.00, and upon giving said bond said writ will issue.

Dated the 8th day of February, 1913.

EDWARD E. CUSHMAN,
Judge.

[Endorsed]: "Filed U. S. District Court, Western District of Washington. Feb. 8, 1913. Frank L. Crosby, Clerk. By E. C. Ellington, Deputy."
[71]

Error Bond [of Plaintiff].

Know all men by these presents that we, John B. Stevens & Company, as principal, and the other subscribers hereto, as sureties, are held and firmly bound unto the Frankfort Marine, Accident & Plate Glass Insurance Company, in the sum of Five Hundred (\$500.00) Dollars, for which we bind ourselves, our heirs, administrators, successors and assigns.

The condition of this bond is such that whereas said John B. Stevens & Company has sued out a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the judgment rendered in this cause on the 4th day of January, 1913; now, therefore,

If said John B. Stevens & Company shall prosecute its said writ of error with effect and answer all costs and damages that may be awarded against it if it shall fail to make good its plea, then this obligation to be void; otherwise to be in force and effect.

Dated Feb. 8, 1913.

JOHN B. STEVENS & COMPANY.

By JNO. B. STEVENS, Pres't.

JNO. B. STEVENS,

L. B. da PONTE,

Sureties.

Approved this 8th day of Feb., 1913.

EDWARD E. CUSHMAN,

Dis. Judge.

[Endorsed]: "Filed U. S. District Court, Western District of Washington. Feb. 8, 1913. Frank L. Crosby, Clerk. By E. C. Ellington, Deputy." [72]

[Defendant's] Assignment of Errors.

Comes now The Frankfort Marine, Accident & Plate Glass Insurance Company, a corporation, defendant in the above-entitled action, and plaintiff in error in this proceeding, and in connection with its petition for a writ of error herein makes the following assignment of errors on which it will rely and which it will urge on the prosecution of said writ of error in the above-entitled action, which errors occurred at the trial of said case, to wit:

I.

That the District Court of the United States for the Western District of Washington on the trial of

the said cause erred in admitting in evidence proof of the payment by John B. Stevens & Company, a corporation, defendant in said action, of an attorney's fee in the defense of the case of I. B. Merrill against it. That the testimony was objected to on the ground that it was irrelevant and immaterial because there could be no recovery therefor; it was excepted to and the exception was allowed.

II.

That the said Court erred in this, to wit: That after all of the testimony in the case had been introduced and before its submission to the jury, the defendant moved the Court for a peremptory instruction to the jury to find a verdict in its favor with respect to the attorney's fees and costs paid by the defendant, John B. Stevens & Company, a corporation, in the Superior Court of Pierce County, Washington, in the case [73] of I. B. Merrill against said defendant, for the reason that there could be no recovery therefor on account of the failure of the said defendant to give notice of the accident within ten (10) days, as required by the policy of insurance, and that the motion was denied, and thereupon the defendant, The Frankfort Marine, Accident & Plate Glass Insurance Company, a corporation, excepted to the overruling and denying of the said motion.

III.

That the Court erred in instructing the jury as follows:

“Counsel have conceded in court that the expenses in the superior court that plaintiff was occasioned by defending this suit was \$260.00 and

for certain witnesses, twelve in number, and the plaintiff would be entitled to recover for its liability to pay those witnesses two dollars a day for the time they attended on the court, and ten cents a mile for the distance they had to travel, which the plaintiff does not claim was more than two miles, one mile going and one coming. Counsel have also conceded that they do not claim more than one day for the witnesses. \$26.40 is the amount for the witnesses, and \$260.00 for attorneys and court costs, which would make \$286.40 expense that the plaintiff was put to in defending the case after it claims that the defendant refused to defend for it.”

That after the Court had so instructed the jury and before they had returned a verdict, defendant duly and regularly excepted to the charge and instruction aforesaid, which informed the jury that they might return a verdict in favor of the plaintiff for the costs incurred by it in defending the suit of Merrill against it in the Superior Court of Pierce County, Washington.

IV.

That the Court erred in overruling and denying defendant's motion for judgment notwithstanding the verdict, the said motion being based on the theory that the failure to [74] give notice of the accident within ten days after its occurrence, deprived the plaintiff of any benefits under the policy, including the right to have the action brought by Merrill against the plaintiff defended by the defendant. An exception was duly and regularly taken and allowed to the denial of the motion for judgment notwith-

standing the verdict.

Wherefore the said The Frankfort Marine, Accident & Plate Glass Insurance Company, a corporation, defendant, prays that said judgment of the District Court of the United States for the Western District of Washington may be reversed and that an order may be entered directing a judgment in its favor in said action on the errors herein assigned.

R. S. HOLT,

U. E. HARMON,

HUDSON, HOLT & HARMON,

Attorneys for The Frankfort Marine, Accident & Plate Glass Insurance Company, a Corporation,
Defendant.

Service by a true copy hereof admitted this 27th day of February, 1913.

L. B. da PONTE,

J. W. QUICK,

Attorneys for John B. Stevens & Company, Defendant in Error.

[Endorsed]: "Filed U. S. District Court, Western District of Washington. Feb. 27, 1913. Frank L. Crosby, Clerk. By E. C. Ellington, Deputy." [75]

Petition of Defendant for Writ of Error.

Comes now The Frankfort Marine, Accident & Plate Glass Insurance Company, a corporation, defendant in the above-entitled action, and says that on or about the 4th day of January, 1913, this Court entered judgment herein in favor of the plaintiff and against this defendant, and that a motion for judg-

ment *non obstante veredicto* was duly filed in said cause by this defendant within the time allowed by law, which was overruled on the 6th day of February, 1913, that in the judgment and proceedings had prior thereto and in overruling the said motion for judgment *non obstante veredicto* certain errors were committed to the prejudice of this defendant, all of which will more in detail appear from the Assignment of Errors which is filed with this petition.

WHEREFORE this defendant prays that a writ of error issue in its behalf out of the United States Court of Appeals for the Ninth Circuit for a correction of the errors so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the said Circuit Court of Appeals.

R. S. HOLT.

U. E. HARMON,

HUDSON, HOLT & HARMON,

Attorneys for Defendant.

Service of the foregoing Petition for Writ of Error admitted and a true copy thereof received this 27th day of February, 1913.

J. W. QUICK,

L. B. da PONTE,

Attorneys for Plaintiff. [76]

[Endorsed]: "Filed U. S. District Court, Western District of Washington. Feb. 27, 1913. Frank L. Crosby, Clerk. By E. C. Ellington, Deputy." [77]

Order Allowing Defendant Writ of Error.

This 27th day of February, 1913, came the defendant and plaintiff in error. The Frankfort Marine, Accident & Plate Glass Insurance Company, a corporation, by its attorneys, and filed herein and presented to the Court its petition praying for the allowance of a Writ of Error, and with it presented an Assignment of Errors intended to be urged by it; praying, also, that a transcript of the records, proceedings and papers on which the judgment herein was rendered, duly authenticated, may be sent to the Circuit Court of Appeals, for the Ninth Judicial Circuit, and that such other and further proceedings may be had as may appear proper in the premises.

On consideration whereof the Court does allow the writ of error upon the defendant and plaintiff in error giving bond according to law in the sum of \$600.00 which shall operate as a supersedeas bond.

EDWARD E. CUSHMAN,

District Judge of the United States for the Western District of Washington, Southern Division, Before Whom said Cause was Heard.

[Endorsed]: "Filed U. S. District Court, Western District of Washington. Feb. 27, 1913. Frank L. Crosby, Clerk. By E. C. Ellington, Deputy." [78]

Bond of Defendant on Writ of Error.

KNOW ALL *EMN* BY THESE PRESENT:
That we, The Frankfort Marine, Accident & Plate Glass Insurance Company, a corporation, Plaintiff

in Error, as principal, and ROYAL INDEMNITY COMPANY, a corporation organized under the laws of the State of New York, and authorized to act as surety on judicial bonds by the Attorney General of the United States, as surety, are held and firmly bound unto the defendant in error, John B. Stevens & Company, a corporation, in the full and just sum of SIX HUNDRED DOLLARS, to be paid to the said defendant in error, his attorneys, successors or assigns, to which payment, well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally by these presents.

Sealed with our seal~~d~~ and dated this 25 day of February, 1913.

Whereas, lately at a District Court of the United States for the Western District of Washington, Southern Division, in a suit pending in said court between John B. Stevens & Company, a corporation, plaintiff, and The Frankfort Marine, Accident & Plate Glass Insurance Company, a corporation, defendant, a judgment was rendered against said The Frankfort Marine, Accident & Plate Glass Insurance Company, a corporation, and the said The Frankfort Marine, Accident & Plate Glass Insurance Company, a corporation, having obtained a writ of error and filed a copy thereof in the clerk's office of the court to reverse the judgment in the aforesaid suit and a citation directed to the said John B. Stevens & Company, a corporation, citing and admonishing him to be and appear at [79] a session of the United States Court of Appeals for the Ninth Circuit, to be held at the city of San Francisco, State of Cali-

fornia, in said Circuit, on the 29 day of March, 1913, next.

Now, the condition of the above obligation is such that if the said The Frankfort Marine, Accident & Plate Glass Insurance Company, a corporation, shall prosecute the said writ of error to effect and answer all damages and costs if it fail to make the said plea good, then the above obligation to be void; otherwise to remain in full force and virtue.

THE FRANKFORT MARINE, ACCIDENT
& PLATE GLASS INSURANCE COM-
PANY,

By E. A. STROUT & CO.,
Agents.

ROYAL INDEMNITY COMPANY,
(R. I. Co. Seal)

By ALBERT KOCH,
Attorney in Fact.

Attest: R. P. OLDHAM,
Attorney in Fact.

Signed, sealed and delivered in the presence of:

_____.

Approved:

EDWARD E. CUSHMAN,
United States District Judge.

[Endorsed]: "Filed U. S. District Court, Western District of Washington. Feb. 27, 1913. Frank L. Crosby, Clerk. By E. C. Ellington, Deputy." [80]

**Certificate of Clerk U. S. District Court to Record,
etc.**

United States of America,
Western District of Washington,—ss.

I, Frank L. Crosby, Clerk of the United States District Court for the Western District of Washington, in pursuance of the command of the Writ of Error herein, herewith transmit a true and correct copy of all proceedings and the record in the case of John B. Stevens & Company, plaintiff and plaintiff in error, versus The Frankfort Marine, Accident & Plate Glass Insurance Company, a corporation, defendant and defendant in error, lately pending in the United States District Court for the Western District of Washington, under my hand and the seal of said Court.

And I hereby attach and *herewith* original Writs of Error and original Citations of the respective parties herein.

And I do further certify that the cost of preparing and certifying said transcript of the record amounted to the sum of \$32.30, which amount has been paid to me by the attorneys in said case.

ATTEST my official signature and the seal of this Court this sixth day of March, A. D. 1913.

[Seal]

FRANK L. CROSBY,

Clerk. [81]

[Endorsed]: No. 2255. United States Circuit Court of Appeals for the Ninth Circuit. John B. Stevens & Company, a Corporation, Plaintiff in Er-

ror, vs. The Frankfort Marine, Accident & Plate Glass Insurance Company, a Corporation, Defendant in Error, and The Frankfort Marine, Accident & Plate Glass Insurance Company, a Corporation, Plaintiff in Error, vs. John B. Stevens & Company, a Corporation, Defendant in Error. Transcript of Record. Upon Writs of Error to the United States District Court of the Western District of Washington, Southern Division.

Filed March 14, 1913.

FRANK D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

[Order Enlarging Time Under Rule 16.]

*In the United States Circuit Court of Appeals, for
the Ninth Judicial Circuit.*

JOHN B. STEVENS & COMPANY,
Plaintiff in Error,
vs.

FRANKFORT MARINE, ACCIDENT & PLATE
GLASS INSURANCE COMPANY,
Defendant in Error.

Now, on motion of L. B. Da Ponte, attorney for plaintiff, and good cause appearing therefor,—

IT IS NOW ORDERED that the time within which the return on the Writ of Error sued out herein by John B. Stevens & Company may be made,

be and the same is hereby extended to and including the 29th day of March, A. D. 1913.

Dated March 7th, 1913.

EDWARD E. CUSHMAN,
Judge.

[Endorsed]: No. 2255. In the Circuit Court of Appeals of the United States for the Western District of Washington, Ninth Judicial Circuit. John B. Stevens & Company, Plaintiff in Error, vs. Frankfort Marine etc. Ins. Co., Defendant in Error. Order Extending Time on Writ of Error of John B. Stevens & Co. Filed Mar. 14, 1913. F. D. Monckton, Clerk.

[Writ of Error of John B. Stevens & Co.]

In the District Court of the United States for the Western District of Washington, Southern Division.

JOHN B. STEVENS & COMPANY

vs.

FRANKFORT MARINE, ACCIDENT & PLATE
GLASS INSURANCE COMPANY,

The President of the United States, to the Honorable Judges of the United States District Court for the Western District of Washington, Southern Division, Greeting:

Because in the record and rendition of the judgment in said court before you, in a cause wherein John B. Stevens & Company is plaintiff and Frankfort Marine, Accident & Plate Glass Insurance Com-

pany is defendant, manifest error hath happened to the injury of said plaintiff, and we being willing that *said should* be corrected and justice done to said plaintiff, do command you, under your seal, to send the records and proceedings aforesaid to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco, California, in said circuit, in thirty days from the date of this writ, in order that said Court of Appeals may correct said error, as of right ought to be done.

Witness the Honorable EDWARD DOUGLAS WHITE, Chief Justice of the United States, this 8 day of February, 1913.

EDWARD E. CUSHMAN,

U. S. District Judge.

[Seal]

FRANK L. CROSBY,

Clerk U. S. D. C., West. Dist. Wash.

By E. C. Ellington,

Deputy Clerk U. S. District Court, Western District of Washington.

[Endorsed]: No. 2255. United States Circuit Court of Appeals for the Ninth Circuit. Writ of Error. Filed Mar. 14, 1913. F. D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

[Citation on Writ of Error of John B. Stevens & Co.]

*In the District Court of the United States for the
Western District of Washington, Southern Di-
vision.*

JOHN B. STEVENS & COMPANY

vs.

FRANKFORT MARINE, ACCIDENT & PLATE
GLASS INSURANCE COMPANY,

The President of the United States of America, to
Frankfort Marine, Accident & Plate Glass In-
surance Company, Greeting:

You are hereby cited and admonished to be and appear at the *United States Court* of Appeals for the Ninth Circuit at the courtroom of said court in San Francisco, California, within thirty days from the date of this citation, pursuant to a writ of error filed in the clerk's office of the District Court of the United States for the Western District of Washington, Southern Division, in a cause wherein John B. Stevens & Company is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned be not corrected and speedy justice done to the parties.

Witness the Hon. EDWARD DOUGLAS WHITE, Chief Justice of the United States, this 8 day of February, 1913.

EDWARD E. CUSHMAN,
U. S. District Judge.

Due service of the within citation is admitted this 8 day of Feb., 1913.

R. S. HOLT and
U. E. HARMON,
Atty. for Deft. in Error.

[Endorsed]: No. 2255. United States Circuit Court of Appeals for the Ninth Circuit. Citation on Writ of Error. Filed Mar. 14, 1913. F. D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

[Writ of Error of Frankfort Marine, Accident and Plate Glass Insurance Company.]

UNITED STATES OF AMERICA.

The President of the United States of America, to the Honorable, the Judge of the District Court of the United States for the Western District of Washington, Southern Division, Greeting:

Because in the records and proceedings, as also in the rendition of the judgment, of a plea which is in the said District Court before you, or some of you, between John D. Stevens & Company, a corporation, the defendant in error, and The Frankfort Marine, Accident & Plate Glass Insurance Company, a corporation, the plaintiff in error, a manifest error hath happened to the damage of the said plaintiff in error, as by its answer appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice be done to the parties aforesaid in this behalf, do command you, if judgment be herein given, that then under your seal, distinctly and openly, you send the records and proceedings

aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you may have the same at San Francisco, California, in said circuit, on the 29th day of March, 1913, next in the said Circuit Court of Appeals, that the records and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to law and custom of the United States ought to be done.

Witness the Honorable EDWARD D. WHITE, Chief Justice of the United States, the 27 day of February, in the year of our Lord one thousand nine hundred and thirteen.

[Seal]

FRANK L. CROSBY,

Clerk of the District Court of the United States for the Western District of Washington, Southern Division.

By E. C. Ellington,
Deputy.

Service of the within and foregoing ——— by the receipt of a true copy thereof, together with true copies of the exhibits recited therein as being attached thereto, hereby is admitted in behalf of all parties entitled to such service by law or by rules of court, this 27 day of Feb., 1913.

J. W. QUICK,
L. B. da PONTE.

[Endorsed]: No. 2255. In the United States Circuit Court of Appeals, Ninth Circuit. The Frankfort Marine, Accident & Plate Glass Insurance

Company, a Corporation, Pltff. in Error, vs. John B. Stevens & Company, a Corporation, Deft. in Error. Writ of Error. Filed Mar. 14, 1913. F. D. Monckton, Clerk U. S. Circuit Court of Appeals, for the Ninth Circuit.

**[Citation on Writ of Error of Frankfort Marine,
Accident and Plate Glass Insurance Company.]**

*In the United States Circuit Court of Appeals for
the Ninth Circuit.*

THE FRANKFORT MARINE, ACCIDENT &
PLATE GLASS INSURANCE COMPANY,
a Corporation,

Plaintiff in Error,

vs.

JOHN B. STEVENS & COMPANY, a Corporation,
Defendant in Error.

The United States of America.

The President of the United States of America to
John B. Stevens & Company, a Corporation,
Defendant in Error, Greeting:

You are cited and admonished to be and appear in the United *States Court* of Appeals for the Ninth Circuit at the courtroom of said court in the city of San Francisco, in the State of California, within thirty (30) days after the date of this citation, to wit: On the 29th day of March, 1913, pursuant to the writ of error filed in the clerk's office of the District Court of the United States for the Western District of Washington, Southern Division, wherein The Frankfort Marine, Accident & Plate Glass Insurance

Company, a corporation, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness EDWARD D. WHITE, Chief Justice of the United States, the 27th day of February, in the year of our Lord one thousand nine hundred and thirteen.

[Seal] EDWARD E. CUSHMAN,
Judge of the District Court of the United States for
the Western District of Washington, Southern
Division.

Service of the within and foregoing Citation and Writ of Error therein mentioned and receipt of true copies thereof are hereby admitted this 27 day of February, 1913.

J. W. QUICK,
L. B. da PONTE,
Attorneys for John B. Stevens & Company, a Corporation, Defendant in Error.

[Endorsed]: No. 2255. In the United States Circuit Court of Appeals, Ninth Circuit. The Frankfort Marine, Accident & Plate Glass Insurance Company, a Corporation, Plaintiff in Error, vs. John B. Stevens & Company, a Corporation, Defendant in Error. Citation. Filed Mar. 14, 1913. F. D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

No. _____

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

JOHN B. STEVENS & COMPANY,
Plaintiff in Error,
VS.

FRANKFORT MARINE, ACCIDENT &
PLATE GLASS INSURANCE COM-
PANY,
Defendant in Error,

AND

THE FRANKFORT MARINE, ACCIDENT
& PLATE GLASS INSURANCE COM-
PANY,
Plaintiff in Error,
VS.

JOHN B. STEVENS & COMPANY,
Defendant in Error,

Brief for John B. Stevens & Company

STATEMENT OF THE CASE.

This is an action on a policy of employer's liability insurance.

The amended complaint (R., p. 5) alleges the execution of the policy covering the period between Novembr 17, 1908, and Novmbr 17, 1909, indem-

nifying plaintiff in error against loss arising from legal liability for damages on account of bodily injury or death suffered by any employee from accidental causes, not to exceed the sum of \$5,000, in addition to the cost of defending an action to recover therefor.

While the policy was in force one I. B. Merrill, an employee, was injured, and on October 28th, 1909, commenced an action to recover damages therefor. Plaintiff immediately sent the summons and complaint to the insurance company with the request that it care for the same, as provided by the policy, but defendant refused to do so, and plaintiff was forced to defend the action at its own cost and incurred an expense of \$1072.95. The Merrill action resulted in a judgment against plaintiff in error for \$6,100, which was affirmed by the Supreme Court of the state, and was paid off and discharged, together with interest and costs, by plaintiff in error.

The allegations of the complaint are admitted except in one particular, the defendant pleading that the policy required the assured, upon the occurrence on an accident, to give immediate notice thereof, and that said I. B. Merrill was injured on or about the 15th of June, 1909, *“and that the plaintiff well knew that he had received the said injuries, but that, notwithstanding such knowledge * * did not give notice of the said injury or the accident from which it arose * * * until the latter part of October or the first part of November following” * * ** and further, *“that by reason of the failure of plaintiff to give notice, and its failure to investigate the*

accident, and to preserve the testimony, *the evidence became destroyed and the witnesses scattered, and at the time the action referred to in plaintiff's complaint was brought, by reason of the neglect of the plaintiff to properly attend to the matter and by reason of certain changes and alterations that it had made in the structure at which the accident occurred, it was no longer possible successfully to defend the said action.*" (R., 14-15-16.)

To this answer plaintiff in error replied, denying that it knew of the accident when it occurred on or about the 15th of June, but admitted that it gave no notice until the 19th of October, "and alleges that it had no notice or knowledge of the accident or injury to the said I. B. Merrill until the 19th or 20th of October, 1909, and immediately on learning thereof and on the said 19th or 20th of October, 1909, it gave due notice to defendant." * * * (R., 18-19.)

Plaintiff in error also denied that the defendant had been in any way prejudiced by its failure to get notice of the accident sooner.

The pleadings being in this state, counsel for plaintiff made his opening statement to the jury. The opening statement follows the pleadings, going a little more into detail. With reference to the accident, counsel stated:

"In June or July of 1909 Mr. Merrill, an employee, was injured while, as he claimed, stepping across from the platform of the warehouse to a car loaded with grain, for the purpose of shutting off the grain from the car as it ran

into the hopper. He alleges that he stepped on the hopper from the platform, and that it broke and precipitated him to the ground, through which he received a severe injury. But he did not realize at that time that he was seriously hurt, and continued to work from the time of the accident, whether in June or July, until the latter part of August, at which time he left and went to the hospital, and it was found he had dislocated or broken a kidney, and he was forced to undergo an operation and the kidney was removed. Then about the 19th of October he employed counsel to represent him in his claim, and they served notice or a letter, upon Mr. Stevens, notifying him that Mr. Merrill was injured while in their service and employ and through their negligence." (Rec., 29-30.)

"We have pleaded as an excuse why that notice was not given that the accident to Merrill was not known to have occurred. We will expect to show that neither Mr. Stevens nor Mr. Moore knew anything about any accident until they received the notice from Fitch & Jacobs, attorneys for Merrill, which was served on them October 19th, several months after the accident, and that as soon as they learned of the accident they notified the insurance company." (Rec., 31-32.)

Upon the issue of prejudice to the defendant it was stated that all the witnesses to the accident were present at the trial, except one, and he had left be-

fore the trial but after notice was given the insurance company, and with respect to the alteration in the structure it is shown that it was slight and immaterial and was made before assured knew that the hopper was said by Merrill to have figured in his accident, and further, in any event, the whole factory was destroyed by fire before the case was or could have been tried, so that the hopper would not have been available for use in evidence in any case. (Rec., 32-33.)

At the conclusion of this statement counsel for defendant moved for a judgment on the opening statement (Rec., 34), on the ground, solely, that:

“It was stated that notice was not given because the assured did not know of it, and I desire to present the question that knowledge on the part of the assured cuts no figure.”

This motion was argued at length and the court announced his opinion, sustaining the same so far as plaintiff's claim to recover any part of the judgment in the Merrill case was concerned, but overruling the motion as to the costs of the litigation, holding that the failure to give notice was not a condition precedent to the right to recover the costs. (Rec., 34-35.)

The case then proceeded and was confined to the costs of the trial in the lower court, the costs of appeal being also eliminated as no part of the costs of defending the action. (Rec., pp. 37-38.)

Appropriate offers of proof were made, but all of the evidence was excluded. (Rec., 37-40.)

Defendant offered no testimony. The court instructed the jury that no recovery could be had for more than the costs of defending the Merrill action in the trial court, which were agreed by counsel to be \$286.40 (Rec., 41-42-43), and a verdict was returned in that amount accordingly.

Plaintiff sued out this writ of error to review the rulings of the District Court with respect to its right to recover the amount paid in satisfaction of the Merrill judgment and costs of appeal, and the defendant appealed from that part of the judgment allowing recovery of the costs incurred in the lower court. The writs of error have been consolidated and will be heard together.

ASSIGNMENTS OF ERROR.

I.

The Court erred in ruling on defendant's motion for judgment on the pleadings in holding that there could be no recovery on the policy for the loss sustained by the judgment in the Merrill case.

II.

The Court erred in excluding the testimony sought to be elicited from the witness, Stevens, as follows:

Q. "State whether or not you had any notice or knowledge of that accident or that it was claimed to have occurred on your premises until you got that letter."

A. "No, sir."

Mr. HOLT.—“I object and move that the answer may be stricken as incompetent and immaterial.”

The COURT. — “The answer may be stricken.”

Mr. da PONTE.—“The plaintiff excepts and expects to prove by the witness that this letter of Fitch & Jacobs is the first knowledge that he or any other officer of the plaintiff company had of this accident.”

III.

The Court erred in holding and ruling that the costs of the appeal of the Merrill case were no part of the costs of defending the accident case and could not be recovered.

IV.

Th Court erred in rejecting plaintiff's offer of proof as follows:

Mr. da PONTE.—“I now offer to prove by this witness the facts with respect to the happening of this accident, and that the plaintiff had no notice of it, and that the defendant in any case was not prejudiced by not having notice sooner; that all of the witnesses were available at the time that notice was given to defendant of the accident.”

V.

The Court erred in rejecting the following offer of proof, viz.:

Mr. QUICK.—“The plaintiff now offers to prove by the witness, W. H. Moore, that he was secretary of the John B. Stevens Company at the time Mr. Merrill was injured and for several months thereafter, and in charge of the office of the company and the business of the company as transacted at the office, and that he did not know anything about the alleged injury or claim that Mr. Merrill had been injured until the time of receiving the letter of notification from attorneys Fitch & Jacobs, which has been referred to by the witness, Stevens.”

VI.

The Court erred in his charge to the jury as follows:

“You are instructed that under the law, as the Court has settled it, you cannot return a verdict for more than \$286.40, because there has been no proof under the issues that the Court has allowed to go to the jury of any damage on account of the breach for any greater amount than that.”

VII.

The Court erred in his charge in refusing to submit the case to the jury on the issues made by the pleadings.

POINTS AND AUTHORITIES.

FIRST POINT.

The clause of the policy in question is not to be construed literally and as requiring immediate notice in any event, but should be construed to mean that notice must be given within a reasonable time under the circumstances, taking into consideration the knowledge which the assured had or did not have of the accident, as well as the effect which the lack of such notice had on the rights of the insurer, as to whether it was prejudiced by not having notice sooner.

All of these matters were questions of fact which should have been submitted for the determination of the jury under appropriate instructions.

The "joker" in the policy is as follows:

"2. That upon the occurrence of an accident, whether any claim be made in respect thereof or not, the assured shall immediately, and at the latest within ten days, or within the time fixed for giving notice of an accident under liability insurance policies by any special law of the state in which the policy is issued, give notice in writing of such accident to the company, addressed," etc.

When it is recollected that the offers of proof and opening statement of counsel showed that the assured was in total ignorance of the accident until the letter from Fitch & Jacobs, dated October 19th, 1909 (Rec., p. 59), was received, and that it was

also shown that the company was in no way prejudiced by the want of notice sooner, we need do no more than refer to the recent decision of this court in the case of *Empire State Surety Company vs. Northwest Lumber Company*, No. 2184, Feb. 24th, 1913, not yet reported. In justice to the learned district court it should be added that this decision had not been rendered when this case was tried.

But the clause in question is even less susceptible of the literal construction placed on it than the one construed in the case cited. After stipulating for "immediate" notice and notice "within ten days," it is then, in the same sentence, provided that notice within the time required by any state law shall be sufficient. It is thus apparent that the company did not regard immediate notice or notice within ten days as of controlling importance, because they were perfectly willing to execute the contract under the terms as to notice which might be provided by the laws of the several states in which they do business. In view of this, how can counsel have the hardihood to contend that either "immediate" notice, or notice "within ten days," was a *sine qua non*, but for which the policy would not have been delivered? We submit that by the very terms of the clause in question the harsh and literal meaning now sought to be given the policy is wholly inadmissible.

Another consideration militating against the construction now sought to be imposed on the policy is deducible from its express provisions. The policy indemnifies assured against accidents to its employees "*happening in, upon or about the premises*

and in the business of the assured, as described on the back hereof.” (Rec., 46-47.)

By Part 6 it is provided that the policy shall not cover accidents to employees whose wages are not included in the estimated payroll and in the sworn statement of the actual payroll expended. (Rec., p. 50.)

Part 17 provides that the policy shall not cover an accident resulting from failure of assured to comply with the provisions of any factory law, nor from a violation of any legal ordinance.

The notice required by Part 2 must, of course, be limited to such accidents as are covered by the policy, viz., accidents happening “in, upon or about the premises of assured and in its business,” and not excepted by the clauses referred to. Therefore, before assured was under obligation to give any notice at all it must have been contemplated that he would know of the accident and of the details thereof sufficiently to be able to determine whether it was one of which he was required and expected to give notice. It seems to us, therefore, that, taking the policy as a whole, assured was not expected or required to give notice whether he had it to give or not. Upon this feature the following case is in point:

Aetna Indemnity Co. vs. Crowe, 154 F. 545 (CCA8C).

A policy indemnified insured against “fraudulent or dishonest acts of the employee amounting to embezzlement or larceny,” and required immediate notice of any fraudulent or dishonest act of the em-

ployee which might involve a loss under the policy. The employee committed an embezzlement and an action was brought on the policy. The defense was that the notice required was not given. It appeared that the employee's books were checked and many very suspicious circumstances were discovered, but no notice was given until it became certain that an embezzlement had occurred. The court holds on the authority of

American Surety Co. vs. Pauly, 170 U. S. 133, that no notice need be given until insured had knowledge that an "embezzlement" had been committed — in other words, of a loss for which the insurer would be liable, saying:

"In *American Surety Co. vs. Pauly* the Supreme Court, in considering the knowledge required to move an employer to give a notice like that required in this case, approved an instruction given by the trial court in the following words:

'And in considering this issue you are to inquire, first, when it was that the plaintiff became satisfied that the cashier had committed dishonest or fraudulent acts which might render the defendant liable under this policy. He may have had suspicions of irregularities. He may have had suspicions of fraud. *But he was not bound to act until he had acquired knowledge of some specific or dishonest act which might involve the defendant in liability for misconduct.*' "

It would seem true to say, therefore, that we have the very highest authority for saying that assured was not expected to give notice of an accident until he had knowledge thereof, and of the particulars sufficiently to advise him that a loss had occurred which would render the insurer liable under its policy.

Still another consideration repelling the construction adopted in the lower court is deducible from the language in clause 2. It requires notice to be given "whether any claim be made in respect thereof or not," but it does not provide that notice shall be given "whether assured knows of the accident or not." Had it so provided, a manifest solecism would exist. Such a provision would be absurd. It would require what is manifestly impossible of fulfillment. That such requirements in contracts are void is elementary law. Yet the construction defendant contends for would make the policy require an impossibility. The court will not lightly presume, in the absence of compelling words, that the parties intended to stipulate for the performance of an impossibility for no other purpose than to effect a forfeiture and enable the company to escape its solemn obligation. On this feature the language of this court in the case of the Northwest Lumber Company is pertinent:

"It is self evident that a party cannot give notice of an accident in respect of which a claim can be made until he himself is informed of it or has knowledge concerning it, and he could not

be expected to do so. *The clause (F) alluded to does not require that he shall give the notice whether he has such knowledge or information or not.*"

The contention we make is supported by a practical unanimity of authority, including the Supreme Court of the United States.

Fid. & Dep. Co. vs. Courtney, 186 U. S. 342.

American Surety Co. vs. Pauly, 170 U. S. 133.

The first case cited was an action on a good conduct bond which required immediate notice of a default. It was held that notice given by assured within a reasonable time after knowledge of the default satisfied the requirement of the policy, and the case of *Ward vs. Maryland Casualty Company*, 51 Atl. 900 (N. H.), is cited and quoted from with approval. The Ward case involved the construction of a policy of liability insurance such as we have in the case at bar, so that the Supreme Court has made it plain that no distinction in principle exists between the two kinds of policies.

In *Mandell vs. Fid. & Cas. Co.*, 49 N. E. 110 (Mass.), approved by this court in the Northwest Lumber Company's case, the following language occurs:

"The requirement (of immediate notice) must be so construed that an effectual notice could be given in every instance."

Germania Ins. Co. vs. Boykin, 12 Wall., 20 L. Ed. 442:

A requirement of proof and notice of loss under a fire policy is dispensed with where insured was insane and unable to give the notice.

Edgefield Mfg. Co. vs. Maryland Cas. Co., 58 S. E. 969 (S. C.):

Where the manager of insured was ill at the time of the accident and unable to give notice and shortly afterwards died and a temporary successor learned of the casualty policy a month later and then gave notice, it was in time and satisfied a requirement in the policy for "immediate notice."

Counsel may seek to distinguish these cases because the particular "joker" here involved provides that the notice must not be given later than ten days. This is a mere juggling with words in no way affecting the principle involved. It only means that notice may be given within ten days after insured learned of the accident. It is an express provision that notice given within ten days after assured learned of the accident would be sufficient. Here we gave notice the same day we learned of the accident.

Woodmen's Ac. Ass'n vs. Byers, 87 N. W. 546.

A policy required notice to insurer within ten days after the accident. The insured was made insane by the injury. Notice was given by insured's wife, who accidentally discovered the policy more than thirty days after the accident. Held in time as the requirement for notice within ten days would be construed to mean *within ten days after knowledge*

of the accident by the beneficiary. See this case for an extensive review of the authorities.

Phillips vs. U. S. Ben. Soc., 79 N. W. 1 (Mich.).

A policy provided for immediate notice of the accident, and if notice was not given within five days from the happening of the accident the claim would be invalid. Held that *notice within five days after insured knew he had been injured by the accident was in time.*

In this case the physician attributed the illness to rheumatism or neuralgia, but subsequent examination by other physicians showed the injury was due to an accident occurring two months before assured was taken ill. The notice was held in time.

In view of the well settled rule that where a policy is susceptible of two constructions that one most favorable to the assured and which will save a forfeiture will be adopted (*Imperial Fire Ins. Co. vs. Coos*, 151 U. S. 38, L. Ed. 231; *London As. Co. vs. Companie, etc.*, 167 U. S. 42, L. Ed. 113), it would seem too clear for contradiction that the construction contended for by the company is wholly inadmissible. As observed by the Supreme Court of Washington in a similar case, it must be presumed that the company intended, when it executed the policy and accepted insured's money, to issue a contract which would be available for the protection of assured in every proper case, and to give such a construction as would defeat this expectation would be equivalent to saying that the company had obtained money "under false pretenses." (*Sheard vs. U. S.*

F. & G. Co., 58 W. 29.) Going a little more into details than is disclosed by the offers of proof, suppose that when the matter is fully developed the following state of facts be made to appear, viz.:

One Merrill was working for J. B. Stevens & Company at its wholesale grain and feed warehouse. In the latter part of August, 1909, he asks for a leave of absence, saying he is ill. His foreman grants the leave requested. On his way from the warehouse he meets his employer, John B. Stevens, and the following conversation occurs: "Q. Where are you going, Merrill? A. I am going to the hospital. Q. What is the matter with you? A. I don't know what's the matter. I am going to the hospital to find out." He goes accordingly. Nothing more is heard from him, but his wages are paid while he is being treated at the hospital for some weeks, and finally, on the 19th day of October, 1909, a letter is received from Fitch & Jacobs, his attorneys, advising that Merrill met with an accident while in assured's employ. This being the first and only knowledge of the accident that assured had, and in fact, the injured man, himself, being wholly unaware of his own accident, having remained at work for more than thirty days after he claimed to have met with his accident. Under these circumstances, we submit, no court can hold that assured was in default for not giving notice sooner than it did, and plaintiff in error was entitled to go to the jury on the issue whether the notice was given in a reasonable time, under all the circumstances of the case.

Counsel for defendant in error himself fully realized that it was necessary to show knowledge on the part of assured, for he has expressly pleaded that assured had such knowledge of the accident when it occurred. This plea is wholly inconsistent with his present attitude. Defendant in error having itself raised this issue in its answer, it seems to us it should now be estopped from contending that it was a wholly immaterial one.

SECOND POINT.

Whether notice was given in time or not is immaterial unless the company was prejudiced by not having notice sooner.

Regardless of the question of notice, we submit that the company cannot escape its liability unless it can show substantial prejudice by reason of lack of notice. The defendant in error has again tacitly admitted this proposition because it affirmatively pleads prejudice for want of notice. It has itself raised the issue in its answer and having done so is estopped from pretending that such issue is an immaterial one.

But in the case of the Northwest Lumber Company this court has held that prejudice must be shown in order to make available the provision for notice, saying:

“On the other hand, it does not appear that the surety company has been prejudiced in its rights by reason of any delay in being informed or notified of the accident, and it is altogether probable that justice had been done in the premises.”

Frank Parmelee Co. vs. Aetna L. Ins. Co., 166 F. 741 (CCA):

This was an action on an employer's liability policy. The company contended that it had not been served with the papers in the action within the time provided for by the policy. The court say:

“In contracts of this kind, to escape liability,

the insurer must show that the breach is something more than a mere technical departure from the letter of the bond — that it is a departure that results in substantial prejudice and injury to its position in the matter."

In the case at bar we have met and denied the allegation of prejudice. We have shown that at the time notice of the accident was given the company every single witness was available, and all but one actually testified at the trial, and the testimony of the missing one can be shown to be merely cumulative of what was testified to by many others. But be that as it may, he was available when notice was given, and that is sufficient. As to the alteration in the structure, it appears that the same was immaterial, was made before anyone even knew Merrill claimed to have been injured on the hopper, and lastly, the whole warehouse was destroyed by fire and hence the structure could not have been used in evidence in any event. This amounts to an absolute demonstration that no prejudice accrued to the insurance company for want of notice sooner, and leads inevitably to the conclusion that it is dishonestly seeking to avoid a just obligation upon the merest technicality, is attempting to place an unfair and dishonest construction on its own language, and one it well knows was never contemplated either by itself or the assured when the policy was executed. The result is that assurd, being forbidden himself to settle the accident, was obliged to take the chances of a lawsuit and has suffered a loss of \$7,000, and

is much worse off than if he had not had a policy of so-called "indemnification," for without it he might have settled the claim for a trifling sum.

But whatever may be the rule as to prejudice under the decisions generally, it is alleged in the answer and admitted in the reply that the contract of insurance was made in Washington. Therefore, it is governed by the laws of Washington.

Eq. L. Ins. Co. vs. Pettus, 140 U. S. 226.

Barry vs. Indemnity Co., 46 Fed. 441, followed in 50 Fed. 511.

Insurance Co. vs. Robinson, 582-88.

It has long been well settled law in this state that a compensated surety cannot avoid its contract for a mere technical breach of the bond. Substantial prejudice must be shown, as held in the Parmelee case, *supra*.

Beebe vs. Redward, 35 Wash. 615.

Ovington vs. Aetna Indemnity Co., 36 Wash. 473.

United States vs. Aetna Indemnity Co., 40 W. 87.

And the burden of pleading and proving prejudice is on the surety.

U. S. vs. Aetna Indemnity Co., *supra*.

And see also the case of *Sheard vs. U. S. F. & G. Co.*, 58 W. 29, for an extended discussion of the principles of construction of contracts of compensated sureties adopted and enforced in this state.

Within the rule of the Sheard case, and the cases cited, it is too plain for successful contradiction that in this state a compensated surety must show prejudice, and such prejudice will never be presumed.

So that we submit that, regardless of the question of notice, a showing of prejudice was a prerequisite to the escape of defendant in error from its solemn obligation.

THIRD POINT.

Plaintiff in error was entitled to recover the costs of appeal as well as the costs of the trial court.

The policy provides in Part 3:

“That if any legal proceedings are taken to enforce a claim against the assured * * * the company shall, at its own cost, undertake the defense or settlement of such legal proceedings in the name and on behalf of the insured, and shall have entire control of such defense”

* * *

Under this clause it was the obligation of the company to have assumed the defense of this action in all of its phases. Due notice was given and the company is bound by what was done by the assured in good faith to the same extent as if it had in fact assumed the discharge of its obligation.

Washington Gas Co. vs. District of Columbia, 161 U. S. 316:

The gas company allowed a hole in the sidewalk to remain open. The city was sued and paid a judgment for personal injuries to a pedestrian by falling in the hole. In an action by the city against the company it was held:

“When a person is responsible over to another, either by operation of law or express contract, and he is duly notified of the pendency of the suit, and requested to take upon him the de-

fense of it, he is no longer regarded as a stranger, because he has the right to appear and defend the action, and has the same means and advantage of controverting the claim as if he were the real and nominal party upon the record. In every such case, if due notice is given to such person, the judgment, if obtained without fraud or collusion, will be conclusive against him, whether he has appeared or not."

Defendant in error having repudiated its liability, it was incumbent upon assured to shift for himself, and he was in fairness bound to exhaust his legal remedies. Acting on the advice of counsel (who, by the way, is also the insurance company's attorney), the case was appealed and these costs incurred. Had the appeal been successful it would have inured to the benefit of the insurr, and under these circumstances it is undoubtedly contemplated by the policy that the insurance company would be liable for all costs incurred.

The policy does not limit the costs to a defense in the trial court, and the language used, to say the least, is susceptible of the construction we contend for. If so, the doubt must be resolved in favor of assured.

Imperial Fire Ins. Co. vs. Coos, 36 L. Ed. 231.

So far as the appeal of the insurance company is concerned, we will only say thta the policy clearly contains separable provisions and obligations, as pointed out by the lower court. The obligation to defend was not made to depend upon the giving of notice of the accident. The judgment of the district court seems right as far as it went. But plaintiff in error should in addition have been allowed the costs of the appeal and the amount paid on the judgment.

We respectfully pray that the judgment appealed from be reversed.

Respectfully submitted,

J. W. QUICK,

L. B. DA PONTE,

Attorneys for John B. Stevens & Company.

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN B. STEVENS & COMPANY, a corporation,

Plaintiff in Error,

VS.

THE FRANKFORT MARINE, ACCIDENT
& PLATE GLASS INSURANCE COMPANY, a corporation,

Defendant in Error,

AND

THE FRANKFORT MARINE, ACCIDENT
& PLATE GLASS INSURANCE COMPANY, a corporation,

Plaintiff in Error,

VS.

JOHN B. STEVENS & COMPANY, a corporation,

Defendant in Error.

No.

Brief for the Frankfort Marine, Accident & Plate Glass Insurance Company

ANSWER TO CERTAIN PARTS OF THE BRIEF
OF PLAINTIFF IN ERROR, JOHN B.
STEVENS & COMPANY.

We deem it proper at the commencement of our brief to call the attention of the court to certain statements contained in the brief of plaintiff in

error, although the argument contained in the brief will be answered at another point in this brief.

On page 4 of the brief of plaintiff in error it is stated that one I. B. Merrill was injured and on October 28, 1909, commenced an action, and that plaintiff in error immediately sent the summons and complaint to the insurance company, and on the same page, in undertaking to state the substance and effect of the pleadings, plaintiff in error endeavors to make it appear that the allegation with reference to the time when Merrill was injured was in the answer in this case. We consider this part of the brief evasive. As a matter of fact, it was alleged in the complaint in this case that Merrill was injured on July 19, 1909 (Transcript of Record, p. 6).

It is also stated on page 4 of this brief that the allegations of the complaint in this case were admitted, with one exception. This is entirely incorrect. The amended complaint set forth the insurance policy as Exhibit "B" and paragraph 1 of the answer to this complaint denied the allegations of paragraph 3. This answer also denied, in paragraph 2, that Merrill was injured on July 19th. In paragraph 5 of the amended complaint it was alleged that immediate notice of the accident was given to the defendant in error. This allegation, as well as other allegations contained in paragraph 5, was denied. Paragraph 6 alleged that plaintiff

in error performed each and every thing required of it by the contract. This was denied by the answer (Transcript of Record, pp. 5, 6, 12, 13 and 14).

On page 7 of the brief of plaintiff in error it is stated that the motion of defendant in error for judgment on the opening statement was sustained in part and overruled in part. This is not correct. The motion was denied *in toto* (Transcript of Record, p. 35). As shown by the record at pages 35 and 36, the court announced that it would exclude evidence of a lack of knowledge of the accident on the part of plaintiff in error, and thereupon the case proceeded and plaintiff in error offered all the evidence which it deemed necessary to make out its case, and the evidence as to a lack of knowledge and as to the costs incurred on the appeal of the case to the Supreme Court, was excluded (Transcript of Record, pp. 36, 37, 38, 44 and 45). There was no limit placed on the right of plaintiff in error to make out its case by proper evidence, but the particular evidence referred to was excluded by the court.

On page 12 of the brief of plaintiff in error is found a statement to the effect that the policy stipulated for "immediate notice" and in the same sentence is the statement that the policy provided that notice "within the time required by any state law shall be sufficient." This is a very inaccurate statement. The exact language of the policy is this:

“That upon the occurrence of an accident, whether any claim be made in respect thereof or not, the assured shall immediately, and at the latest within ten days, or within the time fixed for giving notice of accidents under LIABILITY INSURANCE POLICIES by any special law of the state in which the policy is issued, give notice in writing, etc.” We suppose the idea of counsel in using the word “immediate” was to make the case appear similar to the recent decision of this court in the Empire State Surety Company case, referred to on the same page of the brief.

It was alleged in the answer that the policy was issued in the state of Washington and this fact was admitted in the reply. The purpose of the pleader in making this allegation was to so frame the issue that the court could take judicial knowledge of the existence or non-existence of any special law of the state of Washington. Of course, there is no special law in the state of Washington regulating the time within which notice of accidents must be given, under liability insurance policies.

The very disingenuous argument of counsel, that because the policy provided that notice might be given within the time required by any special law of the state in which it was issued, it appeared that the company did not intend to stand on the ten-day clause, is hardly worthy of an answer. A provision in the policy in conflict with a special law of the

state in which the policy was issued would not be valid and this was the reason for inserting that clause in the policy.

On page 16 of the brief of plaintiff in error is found the statement "that the Ward case involved the construction of a policy of insurance such as we have in the case at bar." This is an incorrect statement. The policy in that case required "immediate notice" and we judge from that part of the opinion found at the bottom of page 516, 93 Am. St. Rpts., that it required the giving of "immediate notice with full particulars." The report of the case does not show whether it was a policy indemnifying against liability, or whether it indemnified against loss from liability. This difference would determine whether the condition was a condition precedent or a condition subsequent. We will point out this more fully later in our brief.

On page 19 of the brief of plaintiff in error is found a supposititious statement of the facts in this case, which has the striking characteristic of being entirely and utterly untrue, and while we recognize the impropriety of indulging in statements of this kind, we will state the supposed facts in this case. Suppose that Merrill falls on one of the plank constituting the side of the hopper and that within a few moments the foreman is informed of the circumstances; that Merrill works a short time and then goes to the hospital, in charge of the foreman,

where he has an operation resulting in the removal of his kidney. Suppose that during the time he is in the hospital the hopper is remodeled and the plank on the side where he fell are knocked off and thrown away, and suppose that afterwards he brings suit and alleges that one of these plank, not being securely nailed, split off from the side of the hopper and caused him to fall, and suppose that when notice of the accident was given to the insurance company, not only is the plank in question off the hopper, but the hopper itself has been enlarged so that the plank which Merrill claims broke off is no longer there; suppose that the wife of Merrill goes regularly to the office of plaintiff in error to receive his wages while he is in the hospital and that the foreman tells Merrill that the wages will be paid because they do not want any suit or trouble about the case.

In answer to the statement of plaintiff in error as to the facts, we submit these facts to the court for their consideration in the same manner and to the same extent that the statement of plaintiff in error is entitled to.

On page 20 of the brief of plaintiff in error is found the statement that defendant in error realized that it was necessary for it to show knowledge on the part of plaintiff in error, because it plead it. This was plead as an affirmative defense, but we do not see what bearing this proposition has on the question now before the court. The case was not

tried on this issue and it is very doubtful whether any evidence would have been offered in support of this affirmative defense if the court had held that plaintiff in error was not required to give the notice until within ten days after it had knowledge of the accident. On the other hand, plaintiff in error alleged in its complaint that it gave "immediate notice," and the policy itself set forth as an exhibit to the complaint contained the requirement that notice must be given within ten days, and by the denials in the answer of defendant in error the issue was raised whether the notice was given in ten days. It was optional with defendant in error when it came to making its defense, to prove knowledge or to stand on the ruling of the court requiring it. We think no more need be said on this subject.

On page 21 of the brief of plaintiff in error it is stated that defendant in error tacitly admitted that it was necessary to show prejudice by pleading prejudice and that, having raised the issue, it is estopped from pretending that the issue is an immaterial one.

It is a new proposition to us that by pleading an affirmative defense, which in no way admits the allegations of the plaintiff's complaint, and which relates to a matter collateral thereto, plaintiff in error was relieved from making out his case.

The position of plaintiff in error on this question is that when we plead prejudice in our affirmative

defense, we tacitly stated to the court that unless we were prejudiced plaintiff was entitled to recover. This is a new proposition in pleading and practice and we think it needs no answer.

ARGUMENT.

The policy in question is an EMPLOYERS' LIABILITY POLICY undertaking to indemnify "against *loss* from legal liability for damages on account of bodily injury or death" (Transcript of Record, p. 46).

It contains the agreement "that upon the occurrence of an accident, whether any claim be made in respect thereof or not, the assured shall immediately and, at the latest, within ten days, give notice in writing of such accident" (Transcript of Record, p. 47).

The policy contains the further provision that the special agreements contained in it shall be construed as conditions precedent (Transcript of Record, p. 53).

There are two other provisions in the policy relating to a subsidiary question, to which we will refer the court later.

All the authorities, with the exception of one case, hold that no rights accrue to the assured under a policy of this exact character until there has been a loss by him arising from the payment of a judgment

rendered against him, as required by the terms of the policy.

All the cases hold, we believe, without exception, that a condition requiring notice of the accident, in policies where the contract is to indemnify against *loss* arising from liability for damages, is a condition precedent.

It was conceded in this case that the accident occurred in June or July and that no notice was given until in the latter part of the October following. It was claimed by plaintiff in error that it did not know of the accident until in October and that it then gave notice within ten days after it acquired this knowledge.

It was contended in the court below, that the condition requiring the giving of notice should be construed by the court to read: "That upon the occurrence of an accident the assured shall immediately, and at the latest within ten days after acquiring knowledge of the accident, give notice in writing," instead of "That upon the occurrence of an accident the assured shall immediately, and at the latest within ten days, give notice in writing of the accident."

The primary question is, under such a provision, Does ignorance of the occurrence of an accident excuse a failure by the assured to give the notice within ten days after its happening?

The question involves established elementary rules only.

Will the court enforce, *as it is written*, a condition in a contract which, plain in its meaning and explicit in its terms, is not only in its nature a condition precedent, but is made one by the express provisions of the contract?

Will the court violate fundamental rules governing the interpretation and enforcement of contracts, and, *by construction*, make a new contract for the parties and refuse to enforce the one made by them?

Will it do this in the instance of a condition precedent, where the only claim of ambiguity or uncertainty in the provision in question is, that if taken literally it is harsh and exacting and in a sense unreasonable?

If a condition precedent is harsh and exacting, or even unreasonable, does this afford a justification for the assertion, as a matter of law, that the terms of the condition are ambiguous or uncertain?

Is there any rule of law for the interpretation of contracts which recognizes the idea that if parties enter into a contract containing a condition precedent which is harsh, exacting or unreasonable, such a condition will, by reason thereof, become ambigu-

ous and open to construction or that the court will refuse to enforce it if it is unreasonable?

Would not such a rule be based, of necessity, on one or the other of the two conceptions, that parties do not intentionally make contracts which are harsh, exacting or unreasonable and that, therefore, some other meaning must be given to the words which impart to them this character, or that the law does not recognize and enforce such contracts when they are made?

Are not such conceptions contrary to the spirit and letter of our law?

The whole case is stated in the foregoing propositions and they are elementary in character. In addition we will say, the answer to each of them is plainly suggested by its mere statement.

We cannot understand on what theory it is urged that a provision in policies of this kind, requiring notice of an accident, within ten days from its happening, is harsh, exacting or unreasonable, even if it does require notice to be given, before knowledge of the accident has come to the party charged with the duty of giving it. We do not understand on what theory a court would hesitate to give to a provision in a policy requiring such a notice, the meaning which plainly attaches to it and which can only be subtracted from it by a forced process of construction.

Parties to contracts assume various duties and obligations with reference to its subject matter, appropriate to their relation to it. This relation may be such as to properly impose on one of them the duty of ascertaining certain facts or acquiring certain knowledge and acting accordingly, as the basis of a right to enjoy the benefits of the contract.

Where knowledge, within a limited time, of the existence of certain facts, is essential to the preservation of the rights of one of the parties, the other party to the contract, with justice and propriety, may take upon himself the obligation of ascertaining the existence of these facts, and of imparting his knowledge of them, and it should not be regarded as an exacting or unreasonable provision, that imposes this duty on him, as a condition precedent.

The respective duties and obligations of the parties to contracts are usually assumed by those to whom, considering the character of the contract, they naturally and appropriately belong. Liability companies operate through agents who are usually remote from the companies they represent and more or less remote from the place where the business of the assured is conducted, who do not in any way exercise or assume to exercise, any supervision over the conduct of the business which is covered by the policy. The duty of supervising this business, and thus ascertaining the facts affecting the rights of

the insurer, stipulated in the contract, is rightfully imposed on and is appropriately assumed, by the assured himself.

The reasons for the requirement of prompt notice of an accident arising under an Employers' Liability Policy, are too evident to require any statement of them. If not, that which is contained in the suggestions of the courts on this subject is sufficient. It is properly said by the courts that this requirement is of the *essence* of the contract. Than this, no stronger statement, in a legal sense, can be suggested.

In the case of *Travelers' Ins. Co. vs. Myers, et al.*, 57 N. E. 458, the court, in speaking of the condition requiring notice, used this language:

"It is obvious that this stipulation is of the essence of the contract in insurance of this kind. It is not merely a stipulation as to the form of bringing to the notice of the insurer the fact of a loss as in policies of fire and life insurance. It is clearly a matter of substance in the contract, because the obligation of the insurer is not against the mere happening of an accident or an injury, but against 'loss from liability' to employees, who may be accidentally injured. * * * In a very little time the facts may, in a great measure, fade out of memory, or become distorted; witnesses may go beyond reach; physical conditions may change; and, more dangerous than all, fraud and cupidity may have had time to perfect their work. Therefore this stipulation is vital to the contract."

This decision and the reasoning contained in it are particularly applicable to this case where, according to the pleadings, not only did witnesses go beyond reach, but the physical conditions became changed before any notice was given of the accident.

It is not likely that an employer, exercising ordinary supervision over his employees and their labor, would fail to know when one of his employees had met with an accident in the course of his employment. Such a situation might possibly exist, but its improbability affords no reason for the supposition that it was not within the contemplation of the parties when the contract was made. Particularly is this true, in view of the comprehensive and unqualified language of the provision. In fact, the very improbability that an accident would happen without the assured promptly knowing of it, suggests that it would willingly take the chances of its so happening and assume to take precautions against it, and that by the language in question it intentionally did so. If notice of an accident is essential to the preservation of the rights of the insurer, it is not unreasonable to say, in effect, to the assured, "You must assume the duty of giving notice and consequently of ascertaining when your employees are injured and you must take the chances of an injury being sustained without your knowing of it, because in that case if someone must suffer it should not be the company which has no

means of ascertaining the fact, except through you."

Nothing is more common in contracts than for the respective parties to bind themselves absolutely and unqualifiedly to the performance of some act on their part as a condition on which depends their interest in the subject matter of the contract. It is a matter of common occurrence for parties to stipulate for the performance of such a condition, taking the chances of the existence or development of circumstances which may render it impossible for them to comply with it. A failure to comply with the condition is not excused by the happening of contingencies rendering performance impossible, even though they may have been unforeseen at the time the contract was made. The idea is, the courts do not make contracts for the parties and, if they do not for themselves, stipulate against contingencies which may render performance by them impossible, they must abide the consequences. It is in accord with this idea, that the courts enforce the rule that impossibility of the performance of a condition precedent, though it may arise from the act of God or public enemies, is no excuse, though the rule is different where there is a mere failure to perform some duty imposed by law.

It will be observed in this case that neither in the pleadings nor in the evidence which was offered, nor in its opening statement, did plaintiff in error,

John B. Stevens & Company, suggest any reason for the failure to learn of the accident, nor was any excuse for the failure to give the notice intimated, except the bare fact that plaintiff in error did not know of the accident, nor were any circumstances connected with the accident shown. It was not alleged, nor was any evidence offered to establish the fact, that plaintiff in error had shown any diligence in the premises, or that it even knew of the existence of the clause in the policy in question, *or that it would have given the notice even if it had known of the accident.*

We submit to the court this question: Is mere ignorance of the accident an excuse for a failure to give the notice within ten days, under the contention of plaintiff in error itself, unless it be also alleged, or shown, that notice would have been given within the time, if plaintiff in error had known of it?

By some oversight, although the complaint in the original case of *Merrill vs. John B. Stevens & Company*, is found on page 8 of the transcript of the record, the answer in that case is found on page 20, and some of the pleadings in the case at bar are printed between the complaint in the Merrill case and the answer in that case. We call the attention of the court to this fact to prevent confusion in the examination of the transcript.

It appears from the complaint in the Merrill case that it became necessary for him to have one of his kidneys removed, after the accident and before the beginning of his action. This defendant in error, while considering it entirely unnecessary to do so, deemed it not out of place to allege in its answer, as an affirmative defense, that the structure on which the accident occurred had been altered and repaired before notice of the accident was given to it, so that a defense of the action was impracticable (Transcript of Record, p. 14). Plaintiff in error replied to this by alleging that the repairs or alterations took place before it had received any notice of the accident (Transcript of Record, pp. 18-19). The injustice of the rule contended for by plaintiff in error in this case is clearly shown, for it is conceded by the pleadings in the case, that before the giving of any notice, plaintiff in error altered the structure on which the accident occurred. It is, of course, alleged in the reply, that before the trial of the case the structure was destroyed by fire, but it is only fair to presume that if seasonable notice of the accident had been given, the structure would have been photographed before any alterations had taken place, and the subsequent changes in it and its destruction by fire, would have been relatively unimportant.

We may say in this connection, that the answer in the case at bar imposed on plaintiff in error, the

obligation of proving a compliance with the condition requiring notice, regardless of the affirmative defense to which we have referred.

That the court may fully understand the exact character of the case we suggest that the opening statement of the attorney for plaintiff in error be carefully read.

See Transcript of Record, p. 29.

It is settled by an overwhelming weight of authority that under a policy containing the same language as the one involved in this case, no right accrues to the assured thereunder until there has been a loss by him, which loss is defined by the policy to be the payment of a judgment rendered against him on account of the liability referred to in the policy.

Ford vs. Aetna Life Ins. Co., 126 Pac. R. 69.

Allen vs. Gilman, McNeil & Co., 137 F. 136.

Conolly vs. Bolster, 72 N. E. 981.

Allen vs. Aetna Life Ins. Co., Garnishee,
145 F. 881.

Puget Sound Imp. Co. vs. Frankfort Etc. Ins. Co., 52 Wash. 124.

Burke vs. London Guaranty & Acc. Co., 92
N. Y. Supp. 652.

Cushman vs. Carbonado Fuel Co., 122 Ia. 656.

Sheard vs. United States Fidelity & Guar. Co.,
58 Wash. 29.

Finley vs. United States Cas. Co., 113 Tenn. 597.

Frye vs. Bath, Gas & Elec. Co., 97 Me. 241.

Travelers Ins. Co. vs. Moses, 63 N. J. Equity 260.

Byers vs. International Aluminum Co., 101 N. Y. Supp. 83.

There is but one case holding a contrary doctrine and that is the case of *Sanders vs. Frankfort etc. Ins. Co.*, 57 Atl. 655, but the unsoundness of this case is pointed out in the opinion in the case of *Allen vs. Aetna Life Ins. Co.*, *supra*.

In the policy involved in this case it is provided that the special agreements, of which the giving of notice is one, shall be conditions precedent.

We believe it is held by all the cases that a condition like the one in this case, requiring the giving of notice, is a *condition precedent* which must be performed before any liability exists on the part of the insurance company.

Employers Liability Assur. Corp. vs. Light, Heat & P. Co., 63 N. E. 54.

London Guarantee & Acc. Co. vs. Siwy, 66 N. E. 481.

Underwood Veneer Co. vs. London Guarantee & Acc. Co., 75 N. W. 996.

Green vs. Northwestern Live Stock Co., 54 N. W. 349.

California Sav. Bank vs. Am. Surety Co., 87 F. 118.

Ermentraut vs. Girard Fire & Marine Ins. Co., 65 N. W. 635.

Woolverton vs. Fidelity & Casualty Co., 82 N. E. 746.

Travelers Ins. Co. vs. Myers, 57 N. E. 458.

Myers vs. Maryland Cas. Co., 101 S. W. 124.

McFarland vs. United States Mut. Acc. Ass'n., 27 S. W. 436.

11 Am. & Eng. Ann. Cases 253.

4 Cooley's Briefs Ins., p. 3570.

In the case of *Underwood Veneer Co. vs. London Guarantee & Acc. Co.*, *supra*, the court distinguished and criticised the two cases of *Anoka Lbr. Co. vs. Fidelity etc. Co.*, 65 N. W. 353 and *Grand Rapids Elect. Light etc. Co. vs. Fidelity etc. Co.*, 69 N. W. 249, and used this language:

"After careful consideration, we are constrained to hold that the conditions indorsed upon the policy and quoted above were conditions precedent. * * True, there is no forfeiture clause in the contract. Nevertheless, the plaintiff, in order to maintain this action, was bound to perform such condition precedent."

We invite the attention of the court particularly to this case.

In the following cases the distinction between

conditions precedent and conditions subsequent in insurance policies, is aptly discussed:

Employers Liability Assur. Corp. vs. Light, Heat & P. Co., 63 N. E. 54.

Solomon vs. Cont. Fire Ins. Co., 55 N. E. 279.

California Sav. Bank vs. Am. Surety Co., 87 F. 118.

Travelers Ins. Co. vs. Myers, 57 N. E. 458.

McFarland vs. United States Mut. Acc. Ass'n., 27 S. W. 436.

“A well defined distinction exists between two classes of conditions found in insurance policies. Those which operate upon the parties prior to the loss are regarded as matters of substance, upon which the liability of the insurer depends, and are to receive a fair construction according to the intention of the parties, while, as to those prescribing formal requisites by which the previously vested right is made available, a rigid construction is not allowed.” *Employers Liability Assur. Corp. vs. Light, Heat & P. Co.*, 63 N. E. 54.

In this case the words “a fair construction” are used in the sense of “a fair interpretation.”

In the case just referred to, the policy indemnified against *liability* and it was held that the liability attached when the accident happened, and the condition requiring notice thereafter was a condition *subsequent* to be liberally construed.

“The condition requires that immediate written notice shall be given. The word ‘immediate’ cannot be construed literally, without, in many cases, causing a forfeiture. It is frequently impossible, under the circumstances of the accident or death, to give immediate notice. This *condition subsequent* must be liberally construed in favor of the beneficiary.” *McFarland vs. United States Mut. Acc. Ass’n., supra.*

The case just referred to was an action on an accident policy and it refers to the case of *Tripp vs. Society*, 35 N. E. 316, which was also an accident case and a case where the condition was a condition subsequent.

We cannot undertake to review in detail all of the cases which may be cited as having some direct or indirect bearing on this case.

We have carefully examined and considered the cases which are cited in the brief of appellant in support of its position, as well as many other leading ones which might be cited in this case because they discuss and decide questions somewhat similar to the one here involved, and at the same time apply the rules more or less involved in the case at bar, to the facts involved in them.

From this examination we desire to say to the court that the decision in each case turned on the character of the policy in question; its conditions,

and the exact language of each. The conditions which were considered in the cases referred to, varied greatly in character and *no rule can be safely deduced from any of these cases without a careful consideration of the exact language, nature and character of the provisions involved*. In a number of these cases where *conditions subsequent* were under discussion, the court did not refer to them in these terms, but spoke of them as "conditions of this character." In one or two cases the courts seemed to ignore the distinction between the two classes of conditions, but the ambiguity in the provisions in question in them, made the distinction unimportant, because it rendered them subject to construction, even if they were conditions precedent.

The cases may be classified as follows:

1. Cases in which there was a loss by fire and the conditions under consideration were confessedly conditions subsequent.

These cases do not have sufficient bearing on the question to render it desirable to refer to them.

2. Cases arising on accident policies in which the condition was required to be performed after the happening of the accident which imposed a liability on the insurer and established a right in favor of the assured.

To cases of this kind the rules for the interpreta-

tion and construction of conditions subsequent, were applied.

Trippe vs. Provident Fund Society, 37 Am. St. R. 529.

Kenzler vs. American M. A. Ass'n., 43 Am. St. R. 934.

Rorick vs. Railway Officials' & Employers' Acc. Ass'n., 119 F. 63.

Mandell vs. Fidelity & Casualty Co., 49 N. E. 110-113.

3. Cases arising on policies of insurance against the sickness of animals.

The conditions of these policies were construed in accordance with the rules applicable to accident policies.

Green vs. Northwestern Live Stock Ins. Co., 54 N. W. 349.

Swain vs. Security Live Stock Co., 43 N. E. 105.

4. Cases arising on employers' liability policies in which the contract was to indemnify against liability, etc. The condition being one to be performed after the happening of the accident fixing the liability, a reasonable construction was adopted.

Employers' Liability Assur. Corp. vs. Light, Heat & P. Co., 63 N. E. 54.

London Guarantee & Acc. Co. vs. Siwy, 66 N. E. 481.

Woolverton vs. Fidelity & Casualty Co., 82 N. E. 745.

A. Cases in which the contract was to indemnify against loss arising from liability.

Travelers Ins. Co. vs. Myers, 57 N. E. 458.

Columbia Paper Stock Co. vs. Fidelity & Casualty Co., 78 N. E. 320.

5. Cases where the condition, without regard to the character of the policy, required "immediate" notice, or notice "forthwith," of the accident.

In these cases it is held that the use of the words "immediate" or "forthwith" as terms denoting an interval of time, were ambiguous and that they were therefore subject to construction and that a reasonable construction would be put on them.

Fidelity & Deposit Co. vs. Courtney, 186 U. S. 342 (46 Law. Ed. 1193).

Woolverton vs. Fidelity & Casualty Co., 82 N. E. 745.

Myers vs. Maryland Casualty Co., 101 S. W. 124.

Employers' Liability Assur. Corp. vs. Light, Heat & P. Co., *supra*.

London Guarantee & Accident Co. vs. Siwy, *supra*.

Travelers' Ins. Co. vs. Myers, 57 N. E. 458.

Phillips vs. U. S. Benefit Soc. of Saginaw, 79 N. W. 1.

Ward vs. Maryland Casualty Co., 51 Atl. 900.

6. Cases in which the policy of whatever kind, required notice to be given at once, or immediately, or within a fixed time, *with full particulars*.

In these cases it was held that the notice need not be given until there had been time and opportunity to obtain the particulars, and that a reasonable time, or the time fixed in the policy, should be allowed after such particulars had been obtained.

Trippe vs. Provident Fund Soc., *supra*.

Kenzler vs. Am. M. A. Ass'n., *supra*.

Foster vs. The Fidelity & Casualty Co. of N. Y., 99 Wis. 447.

7. Cases in which the language of the provision in question was qualified, limited or restricted by some other provision in the policy which made it subject to judicial construction.

Anoka Lumber Co. vs. Fidelity & Casualty Co., 65 N. W. 353.

Rorick vs. Railway Officials' & Employers' Acc. Ass'n., 119 F. 63.

Case at bar: Case in which the word "immediately" in the condition precedent in the policy is made certain by an express statement of the outside limit of time, the notice being required to be given "immediately and within ten days at the latest."

The following deductions must be drawn from

the decisions of the courts in the cases to which we have referred:

First: Where the notice is required to be given with full particulars after the happening of the event which fixes the liability, even in cases where the limit of time is definitely stated, a reasonable construction will be put on the contract, and where it does not provide that notice shall be given without regard to the question of knowledge on the part of the insurer, the provision will be construed to mean that notice shall be given within a reasonable time, or within the time fixed, after knowledge of the full particulars of the accident has come to the assured.

This latter proposition is particularly applicable to employers' liability policies.

Second: Where an employers' liability policy indemnifies against *liability*, the liability attaches at the time of the accident and the rule applicable to conditions subsequent is applied.

Third: Where the policy requires the giving of "immediate" notice, or notice "immediately," or "forthwith," or "at once," but fixes no limit of time, these words are held to be ambiguous or indefinite, as expressions of time, and the courts therefore construe them to mean within a reasonable time, having in view all of the circumstances

of the case, and it is held where such are the words expressed in the condition, that a reasonable time means a reasonable time after knowledge of the accident has come to the insured.

The courts merely say that it is unreasonable to require notice of that which is unknown to the party charged with giving it.

Fourth: Where the policy requires immediate notice with full particulars, or words which are the equivalent of these, the courts have construed the provision to mean that the notice need not be given until after the particulars have been obtained.

This rule applies to those provisions which are conditions precedent as well as to those which are conditions subsequent.

Fifth: Where the employers' liability policy undertakes to indemnify against *loss* arising from liability, the condition requiring the giving of notice of the accident is a condition precedent: is of the essence of the contract, and will be strictly construed according to its literal terms.

Sixth: Where in a case of a condition precedent, a limit of time is fixed within which the condition is to be performed, the contract will be enforced as it is written and a lack of knowledge of the accident on the part of the assured will not excuse the giving of the notice within the stipulated time.

In the case at bar there is not only a stipulated time but this time is established as a direct and literal qualification of the phrase requiring notice to be given "immediately." It is the legal anti-thesis of a case which merely requires the notice to be given "immediately."

There is no case which we have found where the language of the provision under consideration was at all like the one in the case at bar, which holds adversely to our position. There are several cases in which there was a limitation of the time within which the notice must be given, and they would be quite similar to the case at bar if it were not for the fact that in those cases the notice was required to be given with full particulars *after* the happening of the event which fixed the liability. This distinguishes them from the case at bar and the conditions received the liberal interpretation which is applied to conditions subsequent.

Trippe vs. Provident Fund Soc., supra.

Kenzler vs. American M. A. Ass'n., supra.

The following authorities affirm the proposition that in the case of a condition precedent where the notice is required to be given within a fixed time, the provision is strictly enforced and the notice must be given within that time, without regard to the question of the ability of the insured to do so, or to the question of his knowledge of the accident.

Gamble vs. Accident Assur. Co. Ir., Rep. 4 C. L. 204.

Patton vs. Employers' Liability Co., 20 L. R. Ir. 93.

Victorian Stevedoring etc. Co. vs. Australian Acc. Ins. etc. Co., 19 Victorian (Australia) 139.

Worsley vs. Woods, 6 T. R. 710.

Cassel vs. Lancashire etc. Co., 1 Times L. R. 495.

Ostrander on Insurance, Sec. 221.

Ermentraut vs. Girard Fire & Marine Ins. Co., 65 N. W. 635.

Columbia Paper Stock Co. vs. Fidelity & Casualty Co., 78 S. W. 320.

Woolverton vs. Fidelity & Casualty Co., 82 N. E. 745.

Klein vs. N. Y. Life Ins. Co., 104 U. S. 88, 26 Law. Ed. 662.

Stoneham vs. Ocean R. & General Acci. Ins. Co., L. R. Q. B. Div. 237.

After reading some of the opinions dealing with the question of the giving of notice under insurance policies, and observing the ingenuity and dexterity employed by these courts to escape the conclusion which a proper regard for the fundamental rules of law should force on them, it is refreshing to read the clear and dignified opinion of a court not animated by a desire, to reach a

forced conclusion, such as the one in the case of *Victorian Stevedoring etc. Co. vs. Australian Acc. Ins. etc. Co.*, 19 Victorian, 139, where the following language is used:

“It was contended that the first part of the condition—that notice of any injury must be given to the insurance company within seven days of its occurrence—could not be regarded as a condition precedent because it was unreasonable to so read it. It was said that a man might be injured and might not be made aware of it for months after, and so could not give notice to the insurance company, and it would be a monstrous thing to hold that the policy was void because the insured had failed to give notice of something which he did not know. But it must be borne in mind that accident insurance policies contain many harsh conditions, which the insurers regard no doubt as indispensable, and those who accept such contracts on the basis of the conditions must accept the hardship as a part of the contracts. Although the circumstances might render it very hard or even absolutely impossible to give the notice required, still the insured entered into the contract and placed himself under that obligation, and must abide by it. Apart from such conditions the authorities show that this view is the one which the courts have adopted.”

In the case of *Klein vs. N. Y. Ins. Co.*, 104 U. S. 88, 26 Law. Ed. 662, the wife failed to pay the premiums and plead her ignorance of the policy as an excuse. The court used this language:

“In policies of life insurance time is material and of the essence of the contract and non-payment at the day involves absolute forfeiture if such be

the terms of the contract. * * * In a contract of life insurance the insurer and the insured both take risks. The insurance company is bound to pay the entire insurance money even if the party whose life is insured dies the day after the execution of the policy and after the payment of but a single premium."

In the case of *Woolverton vs. Fidelity & Casualty Co.*, *supra*, the indemnity was against *liability and* immediate notice was required to be given. In this case the court used this language:

"The duty imposed on the insured by his covenant is not passive, but active. Strictly construed, the insured would be bound to give notice immediately after the accident whether he knew of the occurrence or not. This, of course, would be a wholly unreasonable construction and must be rejected. *Trippe vs. Provident F. Society*, 140 N. Y. 23, 35 N. E. 316."

The court used the words "strictly construed" in the sense of "literally or strictly interpreted."

We think the conclusion reached by the court in the case just cited is correct, and that a strict or literal interpretation of the language of the policy under consideration here, would imply that the notice must be given regardless of the question of knowledge by the assured, even more strongly than it does in the case referred to.

It will be observed that in the case last cited the court following the Trippe case, refused to adopt a strict interpretation. This, of course, was due to

the language of the conditions and to the fact that in both cases the condition operated subsequently to the loss and its strict interpretation would have caused a forfeiture of an existing right.

In the case of *Columbia Paper Stock Co. vs. Fidelity & Casualty Co.*, *supra*, where the policy was against loss from liability and required immediate notice, the court said:

“Provisions of this description also affecting the action of the assured *subsequently to the event*, and after the loss * * * have received in this state a construction of the utmost liberality toward the beneficiary, to obviate a forfeiture. Our conclusion, therefore, is that, *if no time is specified* or notice is required to be given immediately, notice given with diligence and in a reasonable time * * * is a legal compliance with such condition.”

In this case it was held that knowledge on the part of the assured was necessary to charge him with default in giving the notice, but the decision rested entirely on the cases construing the word “immediate” and the opinion clearly indicates that if the word “immediate” had been followed by words fixing a definite limit of time, as in the case at bar, the condition would have been literally enforced.

The last case refers to the case of *McFarland vs. U. S. Mutual Acc. Ass’n.*, 27 S. W. 436. It, how-

ever, was a case of condition subsequent. On page 439 of the decision the court said:

“It is frequently impossible under the circumstances of the accident or death, to give immediate notice. This condition *subsequent* must be liberally construed in favor of the beneficiary.”

We concede that for the following reasons, it is held by many of the courts that where notice is required to be given “immediately” or “forthwith” after the happening of an accident, these words are uncertain and indefinite, if treated as words defining a period or limit of time, because literally they mean without any interval of time. They say that the very nature of the undertaking indicates on its face that this was not the meaning intended by the parties, consequently, on account of the ambiguity, the courts rightfully exercise their prerogative of determining what the words do mean, and by analogy determine that they mean within a reasonable time, having in view all of the circumstances. One of the circumstances is the knowledge, or the absence of knowledge by the assured, and they say that a reasonable construction requires that this circumstance should be taken into consideration and that taking it into consideration it would be unreasonable to require the party to give notice of that of which he has no knowledge.

This *construction* of the contract, however, is only indulged by these courts, where the parties

have left the subject ambiguous by the terms they have employed to define it, or where it is a condition subsequent. Where such is not the situation they have not done so, as there is no basis for such construction and the contract must be enforced as it is written.

If one enters into a contract binding himself as a condition precedent to perform a certain act before the happening of some event, it would be no excuse for him to urge that he did not perform the condition because he did not know that the event had happened. If he intended that his performance should depend not upon the happening of the event, but upon his knowledge of its happening, he should have so stipulated in his contract. If one binds himself as a condition precedent to perform a given act "at the latest within ten days" after a certain steamer reaches the port of New York, he is bound to perform his contract within the time fixed after its arrival, without regard to the question whether he knew it had arrived. If his performance was to depend on his *knowledge* of its arrival and not on its arrival, he should have so stipulated.

In one of the cases referred to in our brief, in which an accident policy was involved, the man fell into the water, which froze, and his body was not discovered until the following spring. There it was held that the condition being a *condition subse-*

quent to the attaching of the liability, a liberal construction would be put on the limitation of time and it would be construed to mean that notice should be given within the time fixed, after knowledge of the accident was acquired by the party charged with the giving of it. The court urged that it was impossible to give notice of that of which he had no knowledge.

Impossibility of performance often relieves against the breach of a condition subsequent, but not against the breach of a condition precedent.

In the case at bar it is urged that it is unreasonable to require a man to do what is impossible. That is, to give notice of that of which he has no knowledge. It would seem that this policy was drawn with the view of cutting off such a contention. If it had stopped with the use of the word "immediately," the contention of appellant might under some authorities, be correct, for in such case the court might say that the word "immediately" invites a reasonable construction which involves the idea that one should not be required, unless he expressly engages so to do, to give notice of that of which he has no knowledge. When, however, a time limit is fixed in addition, it seems proper to conclude that the parties themselves determined and agreed on what was reasonable and fixed "ten days at the latest" as the limit of time which was reasonable to acquire the information

and give the notice. This seems clear. If he acquired the information before the expiration of the ten days and did not then give the notice within a reasonable time thereafter, he would probably be in default even if the ten days had not elapsed.

ANSWER TO BRIEF OF PLAINTIFF IN ERROR AND REVIEW OF ITS AUTHORITIES.

The first question of importance discussed by plaintiff in error is the question whether, by the terms of the policy, it was required to give notice of the accident within ten days after it occurred, whether it knew of it or not. We do not care at this point, to pay any attention particularly to the argument contained in the brief on this subject, but we will review the authorities cited in support of it.

On page 13 of the brief of plaintiff in error is cited the case of *Aetna Indemnity Co. vs. Crow*, 154 Fed. 545. An examination of this case will show that the provision in the policy required notice to be given "immediately after the occurrence of such act shall have come to the knowledge of the employer." The question whether notice should have been given before the assured had knowledge of the accident, was, therefore, not involved in this case. The court construed the word "immediately" to mean within a reasonable time, or

without unreasonable delay. No further comment on this case is necessary.

To support the proposition that notice need not be given until knowledge had come to the assured, on page 14 of its brief plaintiff in error cites the case of *American Surety Co. vs. Pauly*, 170 U. S. 133, 42 Law. Ed. 977. In this case the policy required that notice should be given "as soon as practicable after the occurrence of such act shall have come to the knowledge of the employer." The question, therefore, whether the notice should have been given before the employer knew of the act, was not involved in this case and we see no reason why it should have been cited. As a matter of fact the dishonesty of the employee was the act and the insurance company took the position that it was the duty of the assured to give notice of the act, as a dishonest act, on mere suspicion. The court held that the condition should be construed so that the notice need not be given until it knew that the act was a dishonest one. We fail to see how this case is applicable to the case at bar.

On page 16 of the brief of plaintiff in error a quotation is made from the opinion of this court in the *Empire State Surety Co.* case, and it is stated that the contention made by counsel is supported by a practical unanimity of authority, including the Supreme Court of the United States. With this strong statement counsel does not cite a

single case from the Supreme Court of the United States, or elsewhere, sustaining the proposition. It may be conceded that the authorities are almost unanimous in holding that the words "immediately," "immediate" and "at once" are construed to mean within a reasonable time. If this is what counsel refers to we do not dispute the correctness of his statement.

On page 16 of the brief reference is made to the case of *Mandell vs. Fidelity & Casualty Co.*, 49 N. E. 110, to support the proposition that notice need not be given until knowledge of the accident is acquired. We have already pointed out to the court that this case required the giving of "immediate notice" and this rendered it open to construction, and that the court held that the duty to give notice did not arise until the assured had knowledge of the accident, and based the decision on the proposition that the condition was a condition subsequent, distinguishing the case from one where the condition was a condition precedent, and pointing out that the liability of the insurance company became fixed when the accident occurred. The decision in this case was proper, but it has no bearing whatever on a case where the condition is a condition precedent and there is no ambiguity justifying construction by the court, with reference to the question of time within which the notice must be given. As a matter of fact, the case is based largely

on the case of *Trippe vs. Provident Fund Society*, in which the court expressly said that the condition, being one to be performed after the liability attached, was a condition subsequent and should be liberally construed.

On the same page reference is made to the case of *Germania Ins. Co. vs. Boykin*, 12 Wallace 443, 20 Law. Ed. 442, in support of the same proposition. This was the case of a policy of fire insurance and the breach of it did not even consist in a failure to give notice of the fire within the stipulated time, but it consisted in a failure to make proofs of loss, owing to the insanity of the insured. The court merely held that insanity excused the performance of the condition. It was a condition subsequent, the nature of which is not stated in the opinion.

It may be conceded that in the interpretation of conditions subsequent, which, by the terms of the contract, are to be performed after the right of the insured to indemnity has attached, a liberal construction of the policy is adopted to prevent a forfeiture and to prevent the defeat of the purpose of the contract. This is in accordance with the most elementary rules.

On page 17 of the brief, to sustain the same proposition, is cited the case of *Edgefield Mfg. Co. vs. Maryland Cas. Co.*, 58 S. E. 969. This is an-

other case in which the policy provided that the insured should give immediate notice of an accident, with full information concerning it. It was held that this meant that it should be done with reasonable promptness, under the circumstances.

We have not questioned that where the words in a condition are for "immediate notice," the ambiguity in these words justifies the court in construing them and putting on them a reasonable construction.

On page 17 of the brief of plaintiff in error reference is made to *Woodmen's Acc. Ass'n. vs. Byers*, 87 N. W. 546. This was an action on an accident policy where the insured claimed to have been disabled. The policy provided that notice should be given within ten days from the date of the injury. In this case the condition was treated as a condition subsequent, as it was in fact, and the court said:

"It is well to note here that we are not considering a question of complying with conditions before loss or injury."

The court quotes from the case of *Trippe vs. Society, supra*, the following language:

"The condition upon which the defense is based was to operate upon the contract of insurance only subsequent to the fact of a loss. It must therefore receive a liberal and reasonable construction in favor of the beneficiaries."

The court practically concludes its opinion with these words:

“From the foregoing, the conclusion is, we think, fairly deducible that in construing conditions in a policy of insurance with respect to the giving notice of the happening of the event, and the particulars thereof, and preliminary proofs, to be complied with subsequent to the event resulting in loss or injury, and for which indemnity is claimed, a more liberal construction in favor of the beneficiary should be given than when the conditions are to be complied with prior to the happening of such event. * * *”

The opinion in this case is a very long one and the question might have been disposed of in a very few words. The condition, being one operating subsequently to the loss, it was proper to construe it as the court did.

On page 18 of the brief of plaintiff in error, in support of the same proposition, reference is made to the case of *Phillips vs. U. S. Ben. Soc.*, 79 N. W. 1. The opinion in this case is very short and no authorities are cited to sustain the conclusion. It was a case of an accident policy providing for the giving of *immediate* notice, with full particulars. This was a condition subsequent and in addition it was proper to construe it liberally, in accordance with the decisions construing these words.

On page 18 of the brief of plaintiff in error, to support the proposition that where a policy is sus-

ceptible of two constructions, the one most favorable to the assured will be adopted to save a forfeiture, there is cited the case of *Imperial Fire Ins. Co. vs. Coos*, 151 U. S. 452, 38 Law. Ed. 231. It is strange that this case should have been cited by plaintiff in error. The court used this language:

“But the rule is equally well settled that contracts of insurance, like other contracts, are to be construed according to the sense and meaning of the terms which the parties have used, and if they are clear and unambiguous, their terms are to be taken and understood in their plain, ordinary and popular sense.”

The court held that the motion for judgment should have been granted.

On the same page reference is made to *London As. Co. vs. Companie, etc.*, 167 U. S. 42, 42 Law. Ed. 113. The policy contained a provision with reference to the ship being in collision. The insurance company contended that collision meant a *serious* collision, but the court rejected this contention, holding that the words “in collision” meant in collision and that if the insurance company had meant “in serious collision” they failed to say so.

In this connection we desire to call the attention of the court to the case of *Guarantee Co. of N. A. vs. Mech. Sav. Bk. & T. Co.*, 183 U. S. 402, 46 Law. Ed. 253, where the court emphatically refused to

apply the rule invoked by plaintiff in error where there was no ambiguity in the condition.

The case of *Fid. & Dep. Co. vs. Courtney*, 186 U. S. 342, 46 Law Ed. 1193, is also referred to by plaintiff in error to support its contention that notice need not have been given under the policy involved in this case, until knowledge of the accident had come to it. We merely call the attention of the court to the fact that in the *Courtney* case the condition required that "immediate notice" should be given and this case, following the case of *Ward vs. Maryland Cas. Co.*, *supra*, held that the word "immediate," being ambiguous, should be reasonably construed.

If the notice in the case at bar had been given nine days after the accident and we had contended that it was not given "immediately," the word "immediately" would be open to construction on account of its ambiguity, and the court would hold, under such circumstances, that the question was whether the notice was given with reasonable promptness under all the circumstances of the case.

On page 21 of the brief of plaintiff in error the point is made that the failure to give the notice was immaterial unless the company was prejudiced by not having notice sooner. No authority is cited to sustain this proposition, except the case of *Parmalee vs. Aetna Life Ins. Co.*, 166 Fed. 741. In

this case notice was given and afterwards an action was begun and default was taken upon what was alleged to be a false return of service and a year afterwards the assured found out about the suit and gave notice to the insurance company. It was held that the policy could not be defeated without showing that some damage resulted. No reasons are given and the decision is based on *Ward vs. Maryland Cas. Co.*, *supra*, in which it was said:

“That unless there was a provision in the policy making such a failure a cause of forfeiture, it would not be so treated.”

Rumford Falls Paper Co. vs. Fid. & Cas. Co., 43 Atl. 503, is cited in the Parmalee case, but the question of law does not appear to have been presented in the case, the court merely passing on the sufficiency of the evidence to sustain the charge that there was collusion between the assured and the injured person.

We believe that no case can be found where it has been held that in addition to showing a breach of a condition precedent, it is also necessary that the insurance company should show that it was damaged by reason of the breach, nor can a case be found where it was held that a breach of a condition precedent would not be enforced unless there was a provision for a forfeiture in case of its breach. The word “forfeiture,” when applied to

conditions precedent, is a misnomer, but one court used it in this way.

The universal rule is that where the condition is a condition precedent, its breach is fatal without regard to the question of damage resulting from it.

Nat'l Sur. Co. vs. Long, 126 Fed. 887.

Imperial Fire Ins. Co. vs. Co. of Coos, 151 U. S. 38, Law Ed. 231.

The case of *Nat'l Sur. Co. vs. Long*, 125 Fed. 887, cites many cases and particularly the decisions of the Federal courts and is a very full and complete case on the subject.

The case of *Hope Spoke Co. vs. Maryland Cas. Co.*, 143 S. W. 85, also contains a full review of the question, citing many cases and distinguishing those where the conditions were conditions precedent from those where they were conditions subsequent. It uses this language:

"The following authorities fully sustain the view that failure to give notice within a specified time in accordance with the terms of the policy, does not operate as a forfeiture of the right to recover, unless the policy in express terms or by necessary implication makes the giving of notice within a time specified, a condition precedent to recovery. *Accident Ins. Co. vs. Fielding*, 35 Colo. 19, 83 Pac. 1013, 9 Am. & Eng. Ann. Cas. 916; *Southern Fire Ins. Co. vs. Knight*, 111 Ga. 622, 36 S. E. 821, 52 L. R. A.

70, 78 Am. St. Rep. 216; *Insurance Co. vs. Downs*, 90 Ky. 236, 13 S. W. 882, 12 Ky. Law Rep. 115; *Flatley vs. Insurance Co.*, 95 Wis. 618, 70 N. W. 828; *Tubbs vs. Insurance Co.*, 84 Mich. 646; 48 N. W. 296; *Steele vs. German Ins. Co.*, 93 Mich. 81, 53 N. W. 514, 18 L. R. A. 85; *Mason vs. Insurance Co.*, 82 Minn. 336, 85 N. W. 13, 83 Am. St. Rep. 433; *Taber vs. Insurance Co.*, 124 Ala. 681, 26 South 252.

“Nothing in the opinion of this court in *Teutonia Ins. Co. vs. Johnson*, 72 Ark. 484, 82 S. W. 840, conflicts with the views we now express, for that decision was based upon the fact that under the terms of the policy the requirement for notice was made a condition precedent to recovery.”

In the case of *Imperial Fire Ins. Co. vs. Co. of Coos*, 151 U. S. 452, 38 Law Ed. 231, the following language was used:

“The specific thing described in the last condition as avoiding the policy, if done without consent, was one which the insurer had a right, in its own judgment, to make a material element of the contract, and, being assented to by the assured, it did not rest in the opinion of other parties, court or jury, to say that it was immaterial, unless it actually increased the risk.”

It is said, however, that this contract is to be construed according to the laws of the state of Washington, and thereupon certain decisions of the Supreme Court of that state are cited. These cases are all alike in one respect. They relate to the

question of the liability of the surety on a bond and enunciate the well established elementary rule that delay in giving an extension, or some act of that kind, will not discharge the surety, unless he has been damaged.

The case of *Beebe vs. Redward*, 35 Wash. 615, is one of the cases and the court held:

“The surety therefore cannot complain of any breach of the contract which the owner waives that does not operate to his prejudice. * * * In the case at bar there is no showing that the surety has been prejudiced by the failure to complete the building at the time stipulated in the contract, and as the owners for whose benefit the stipulation was inserted make no complaint because thereof, the surety cannot plead it as a bar to the right of the owners to recover for subsequent losses.”

We see nothing in this case applicable to the case at bar.

The case of *Ovington vs. Aetna Ind. Co.*, 36 Wash. 473, is cited. In this case notice came to the owner that two persons who had performed work on the building had not been paid. He did not notify the bonding company. The bond contained a provision that notice should be given to the company of any act on the part of the contractor which might involve a loss for which it, as surety, was responsible, after the occurrence of such act shall have come to the knowledge of the assured. The court held that the terms of the policy showed that the obliga-

tion of the contractor was not to permit claims for builders' materials and labor to become a charge upon the property, and that until there was an effort made to make them a charge on the property, no notice was necessary. The condition in question was construed with reference to other clauses in the bond.

The case of *The United States, for the use, etc. vs. Aetna Ind. Co.*, 40 Wash. 87, does not touch the question in support of which it is cited. Certain evidence was offered showing that an owner had granted a certain indulgence to the contractors, but the Supreme Court held that it was not admissible under the issues in the case.

The case of *Sheard vs. U. S. F. & G. Co.*, 58 Wash. 29, is cited, but for what reason we know not. There was a delay in bringing suit. The Supreme Court held that the breach did not occur until the liens became an established charge and that the limitation of the time for bringing the suit was to be construed so that if there was a reasonable excuse for delaying the suit, the surety would not be discharged.

There is one case, however, which is worthy of citation because it has a direct bearing on this case and on this question. We refer to the case of the *Deer Trail etc. Mining Co. vs. Maryland Cas. Co.*, 36 Wash. 46, in which the right to recover on

a policy providing for immediate notice was denied where the accident occurred in May and the notice was given the January following. It is held that this was an unreasonable delay. There were two parties concerned with the policy; one knew of the accident, but did not know of the policy; the other knew of the policy, but did not know of the accident. All parties seemed to take it for granted that the question of prejudice was immaterial.

This is about the only Washington case that has any direct bearing on the question.

At the bottom of page 22 of the brief of plaintiff in error is found the statement that plaintiff in error was forbidden to settle the action and was obliged to take the chances of a law suit, and is much worse off, etc. As a matter of fact it is settled by an overwhelming array of authorities, that where liability has been denied by the insurance company, and it has refused to defend, the assured may settle and compromise if he pleases, and may thereupon recover against the insurance company for its liability for the fair amount paid in settlement of the case.

On page 25 of the brief of plaintiff in error is found his argument to sustain the proposition that the court below erred in excluding evidence of the attorneys' fees and costs incurred on the appeal to the Supreme Court of the case of Merrill against

plaintiff in error. The argument is hardly worthy of notice. The case cited, as well as the doctrine invoked, contradict rather than affirm the rule for which plaintiff in error contends. It may be conceded that where one who is liable over, is given notice to defend the action and he fails to do so, the costs incurred in the defense by the person sued may be recovered in an action brought against the other person, but this is only in the event that the person to whom notice was given is liable for the cause of action on which judgment was rendered. In other words, the costs follow the question of original liability. In this case we merely contend that, there being no liability, defendant in error is not responsible for any costs, and even if there was a liability it would not be responsible for the costs on appeal, because it was optional with plaintiff in error to appeal the case.

Much stress is laid by plaintiff in error, John B. Stevens & Company, on a recent decision rendered by this court in the case of *Empire State Surety Company vs. Northwestern Lumber Company*, the opinion in which case is before the writer. This brief, with the exception of this particular part, was written before this opinion came out, and it concedes that many of the cases hold that where notice was required to be given "at once" or "immediately," or "at once with full particulars," the ambiguity in these words as denoting a period

of time, rendered them open to construction to determine their meaning.

The case under discussion is a case where notice was required to be given "at once" and this court, following other courts, held that the words "at once" were ambiguous and were to be construed to mean within a reasonable time, having in view all of the circumstances of the case, and that with this construction as to reasonableness put on the words they would be held to mean "at once or within a reasonable time after notice of the accident had been acquired." This was held on the theory that it would be unreasonable to require notice to be given before knowledge of the accident existed. We must conclude on account of our high respect for the care and learning of this court, that the decision in the case under discussion was intended to be limited to its facts and that the language of the court, "the clause (F) alluded to does not require that he shall give the notice whether he has such knowledge or information or not," and the language which precedes it, were intended to be applied to conditions of the character of the one involved in this case. It must be evident that the conclusion reached by this court means that the words "at once," being ambiguous, are open to construction and that with a reasonable construction put on them they mean "at once or within a reasonable time after knowledge of the accident

had been acquired," because it would not be reasonable to require notice when the party does not know of the accident.

In the opinion under discussion, the court said:

"It is self evident that a party cannot give notice of an accident, of which a claim can be made, until he himself is informed of it, or has knowledge concerning it, and he could not be expected so to do."

This language of the court when reduced to terms of legal significance, points either to the impossibility of giving notice under such circumstances, or to the unreasonableness of such a requirement, but whether it points to the unreasonableness or to the impossibility, it was used by the court, not for the purpose of determining the validity or the binding force of the condition under consideration, but it was more in the nature of an argument addressed to the question: What would be reasonable for the court to expect or require of a party in the matter of giving notice of an accident, in the absence of a contract defining it, under the facts and circumstances of the particular case?

If I bind myself to perform an act within ten days after a ship arrives at the port of New York, as a condition precedent in the execution of an agreement, it makes little difference what difficulties there may be in obtaining the information when the ship arrives; having made the contract

and assumed the duty of doing so, I must comply with it if I expect to claim any right dependent upon its performance. If it were necessary to support this rule by any presumption, the presumption would be either that I took the chances, or that I thought that I would be able to inform myself of its arrival, but this presumption would be of no legal significance, as its presence or its absence would not affect the obligation assumed by me. On the other hand, if I undertook to give "immediate notice" or notice "immediately" upon its arrival, it might well be claimed by me that the words "immediately" or "immediate" are uncertain and ambiguous as indicating the time within which the notice must be given. The ship might come into port at night at some unexpected time and leave without my having an opportunity, for some time, to ascertain that she had been present.

If the question of the meaning of the word "immediately" or the word "immediate" came before the court, it would be held to mean that notice must be given within a reasonable time, under all circumstances of the case, and if the court was then called on to say, as a matter of law, what was reasonable under the circumstances, it might, with propriety, decide that it would be unreasonable to say, under the known circumstances, that the party should have given notice until he knew that it had arrived, but when this statement is analyzed it is

found to be more of a statement of a legal conclusion with reference to the facts of the case, than it is the statement of a legal rule.

With the question of the impossibility of performance we have no concern in this case.

L. E. Law & Co. vs. Paxton, 93 S. W. 354.

Stockton vs. Weber, 98 Cal. 441, 33 P. 332-335.

We have no disposition to cavil at the conclusion of this court above referred to, if it is limited to those cases where ambiguity in the expression of a condition precedent renders it proper to reach the intent of the parties by *construction*, or to those cases where the condition is a condition subsequent admitting of the application to it of the rules governing such conditions, but we most vigorously protest against the application of the language in question, to a condition which is not only a condition precedent in its character, but one which is expressly made so by the terms of the contract and which is entirely free from any kind of ambiguity which might justify the court in undertaking to *construe* it and to impart to it *a meaning beyond its language*.

The unreasonableness of a condition precedent does not in any way affect its validity and it must be strictly and literally performed.

6 Am. & Eng. Encyc. of Law, 504.

The opposite is true of a condition subsequent.

6 Am. & Eng. Encyc. of Law, 506.

On the breach of a condition subsequent the estate may or may not become forfeited. On the breach of a condition precedent no estate vests.

If for any reason a condition precedent is or becomes impossible of performance, no estate vests.

6 Am. & Eng. Encyc. of Law, 506.

These propositions are elementary.

Nothing is more common than to find in the decisions of the court, whether they relate to the interpretation of statutes or of contracts, the expression that the subject is not open to construction; its meaning is plain and manifest and it is complete in itself.

It has been said by some of the courts that ordinarily the distinction between interpretation and construction is of little value and of little aid to them. The case at bar, however, well illustrates the value as well as the soundness of the distinction.

A provision that "upon the occurrence of an accident the assured shall immediately, and at the latest within ten days, give notice," is not ambiguous and there is no reason for construing it.

There is a difference between the interpretation

and construction of a contract. Interpretation differs from construction "in that it is used for the purpose of ascertaining the true sense of any form of words," while construction involves the drawing of conclusions regarding subjects that are not always included within the direct expression.

Bloomer vs. Todd, 3 Wash. Ter. 612.

"It would seem to follow from the statement just made as to the object of interpretation, that if the language of the instrument is plain and unambiguous, in itself, there is no room for interpretation or construction and it is quite frequently so stated."

17 Am. & Eng. Encyc. 4. Cases cited note 3.

Whenever parties define the limits of their rights and obligations * * * the compact controls and there is no room for the application of a legal theory that might govern in the absence of an express agreement.

First Nat. Bank vs. McIntosh & Peters Live Stock and Commission Co., 84 P. 535.

Rules of construction are only for reaching the probable intent of the instrument construed.

Moran vs. Lezotte, 19 N. W. 757.

The language used, if unambiguous, must be held to express the intention of the parties.

Piano Co. vs. Ellis, 35 N. W. 841.

In determining the question whether there is

any ambiguity in the condition in question which justifies the court in looking *beyond its words* for the purpose of ascertaining some hidden *meaning*, we must bear in mind that the words involved in the condition in this case have relation solely to the *period of time* within which notice must be given, after the occurrence of the accident. When the condition, in express language, says that this notice must be given within ten days after the happening of the accident, there is no ambiguity involved in the question of time. It is to be noted further, that the condition involved in the case at bar says, that "upon the occurrence of an accident and within ten days thereafter at the latest," and that it clearly fixes as the commencement "upon the occurrence of the accident," and as the termination of the period of time, "within ten days." It is thus seen that there is no ambiguity as to the time when the period of time commences to run or the time when it terminates. The expression of the condition is absolutely complete and entire.

On what basis a court could claim the right to determine the meaning of this perfect expression of time, by attaching to it the question of knowledge of the accident, a subject and a question not involved in it, is incomprehensible to us. Such a proceeding as we have pointed out could only be justified by some ambiguity in the expression of

the condition, and, as we have shown, there is no ambiguity.

In the case of *Imperial Fire Ins. Co. vs. County of Coos*, 151 U. S. 452, 38 Law. Ed. 231, the court used this language:

“The compliance of the assured with the terms of the contract is a condition precedent to the right of recovery. * * * It is immaterial to consider the reasons for the conditions or provisions on which the contract is made to terminate, or any other provision of the policy which has been accepted and agreed upon. It is enough that the parties have made certain terms, conditions on which their contract shall continue or terminate. The courts may not make a contract for the parties. Their function and duty consist simply in enforcing and carrying out the one actually made.”

In this connection and as indicating the sound view to take of this subject, we desire to refer to the case of *Guarantee Co. of N. A. vs. Mechanics' Sav. Bank & T. Co.*, 183 U. S. 402, 46 Law. Ed. 253-262.

In this case notice was required to be given immediately on the assured “becoming aware of any defalcation.” It was contended that these words should be construed most strongly against the insurance company, so as to mean that notice should be given when the assured “had knowledge.” The Supreme Court said there was a difference between the two phrases and that they would not construe

the words so as to impart to them this meaning. Referring to the rule invoked on the question, that insurance contracts are construed most strongly against the company, the court used this language:

“But this rule cannot be availed of to refine away terms of a contract expressed with sufficient clearness to convey the plain meaning of the parties and embodying requirements compliance with which is made the condition to liability thereon.”

This case is referred to in the case of *Fidelity & Deposit Co. vs. Courtney*, 183 U. S. 402, *infra*.

The cases cited by this court in its opinion now under discussion, are cases which have no bearing on the interpretation of the condition involved in the case at bar. These cases are four in number. The first one is the case of *Ward vs. Maryland Casualty Co.*, 51 Atl. 900, 93 Am. St. Rep. 514. It does not appear from the report of this case whether the condition was a condition subsequent or a condition precedent. In other words, it does not appear whether the policy involved was to indemnify against *liability* or was to indemnify against *loss* from liability. If it was the former the condition was, in a sense, a condition subsequent and would not be enforced if it was unreasonable. If it was the latter the condition was a condition precedent. The decision, however, merely turned on the proper construction to be placed on the condition, for the reason that the word “imme-

diated," as denoting an interval of time, was ambiguous.

The second case referred to is *Fidelity & Deposit Co. vs. Courtney*, 186 U. S. 342, 46 Law. Ed. 1193. This was an action on a bond to indemnify against fraud, providing that *immediate* notice of a default must be given, and the Supreme Court adopted the reasoning in the case of *Ward vs. Maryland Casualty Co.*, *supra*. In addition it may be said, that this was a condition subsequent and it admitted of a reasonable construction, both by reason of its ambiguity as well as of its character.

Mandell vs. Fidelity & Deposit Co., 49 N. E. 110, is the third case referred to by the court on this question. It will be observed that in this case the policy indemnified against *liability*, and, as we have pointed out in this brief, upon the happening of the accident the liability became fixed and a condition to be thereafter performed was a condition subsequent and was construed so as not to impair or divest a right which had already attached, to-wit: the right of indemnity against the liability. The decision in this case can be justified on either ground, that the word "immediate," as denoting an interval of time, was ambiguous, or that the condition was a condition subsequent.

In this case the court clearly indicated that it had in mind the distinction between conditions prec-

edent and conditions subsequent by contrasting it with another case and using this language:

"Here the plaintiff's liability to make the compensation which was the thing insured against, was fixed by the accident."

The latter case seems to depend chiefly on the case of *Trippe vs. Provident Fund Soc.*, 35 N. E. 316, which was an action on an accident policy requiring notice to be given with "full particulars," and it was held that the condition contemplated that the notice should not be given until the particulars were obtained, but in the decision itself it says:

"This construction secures to the defendant every benefit and advantage that was intended by the provision of the policy and it cannot, therefore, complain if the very harsh and technical meaning which it now seeks to put upon a *condition subsequent*, is rejected."

It will thus be seen that the Trippe case turned upon the proposition that the condition was a condition subsequent and was therefore open to a reasonable construction.

Woolverton vs. Fidelity & Casualty Co., 82 N. E. 746, is the fourth case referred to by this court on this subject. In this case the policy indemnified against *liability* and the right of the assured to indemnity attached upon the occurrence of the accident imposing a liability on it. A condition to be

performed after the attaching of this liability was a condition subsequent, and was therefore subject to a reasonable construction. The policy also provided for "immediate notice."

We desire to call the attention of the court to the following significant language in the opinion in this case:

"Strictly construed, the insured would be bound to give notice immediately after the accident, whether he knew of the occurrence or not."

We think this is the truth of the whole matter and we think it follows with much greater force, that the condition of the policy in the case at bar, if taken literally, means the same thing. It will be observed, however, that in the Woolverton case the strict interpretation was rejected, the condition being a condition subsequent, and this rejection was based on the ground that the condition was unreasonable. As we have pointed out in the Trippe case the court undertook to and did construe the provision there in question, for the reason that it was a condition subsequent which admitted of construction. In other words, a construction was put on the condition subsequent which would prevent a forfeiture of an existing right and a defeat of the purpose or object of the contract.

We find in the decision of this court in the Empire State Surety Company case nothing leading

to the conclusion that our position with respect to the condition involved in the case at bar, is incorrect, although we find much in the other cases cited by the court, to support the view that it is a sound and reasonable conclusion.

In this connection we desire to call the attention of the court to a fact which ought to be conclusive of this question. As appears from the case under discussion and other cases referred to in our brief, for years the courts have construed the words "immediately" and "at once" to mean within a reasonable time, and that a reasonable time is such time as is reasonably necessary for the giving of notice after knowledge of the accident has been obtained, and in one case, where the notice was required to be given within a fixed time "with full particulars," and the condition was a condition subsequent, it was held that in such a case it meant within the fixed time after such knowledge of the accident came to the party as enabled it to give "full particulars." It is fair to conclude that the framers of the policy in question in the case at bar, were familiar with these decisions and that the policy was worded with reference thereto, and that when to the word "immediately" the words "and at the latest within ten days" were added, they were put in the policy in order to prevent the construction which would have been adopted by the court if only the word "immediately" had been used.

When the courts, construing the words "immediately," "at once," or "immediate," declared them ambiguous as indicating a period of time, and held that by reason of this ambiguity they would be construed to mean within a reasonable time after notice of the accident was acquired, and the framers of this policy, recognizing this view and for the purpose of making that definite and certain which the courts had declared ambiguous, added the words "and at the latest within ten days," the courts should hesitate and refuse to deprive the makers of such a contract of the benefits arising from an expression of it in harmony with and in conformity to, the decisions of the courts already rendered. By the decisions referred to the courts said, in effect: "Make your provision with reference to the time in which notice must be given, plain and unambiguous and it will be enforced as it is written." The policy in question meets this requirement. We believe the foregoing proposition should be conclusive on this question.

It will be observed, it is not claimed by plaintiff in error that there was any understanding between it and defendant in error that notice of an accident need not be given until after knowledge of it had been acquired. The contention of plaintiff in error is, that the words used in the condition in the policy mean this as a matter of law, because it is proper for the court to give this meaning to the

words actually used, by construing them with reference to an idea and a subject not embraced within them.

Suppose we put the question of the ambiguity of the language used in the policy and the right of the court to attach to it, by construction, the meaning contended for by plaintiff in error, to a practical test. The contract is in writing. If plaintiff in error should have contended that there was a contemporaneous or an antecedent oral agreement that notice need not be given until knowledge of the accident had been acquired, and should have offered evidence to this effect, would it not have been rejected for the reason that it would vary, contradict, or alter the terms of a written contract?

If a contract says that within ten days after the occurrence of an accident notice must be given, to say that the notice need not be given until ten days after knowledge of the accident had come to the assured, would certainly be a variation and an alteration of the terms of the contract. It would be more than that; it would be a new contract.

It may be conceded that if some portion of an agreement between the parties is not incorporated in the written contract, parol evidence of it may be introduced, provided it does not vary, alter, or contradict the plain language of the written instrument.

It may also be conceded that where a contract is ambiguous in its terms, that is, where its words do not plainly express a definite and fixed idea in harmony with its purpose, parol evidence of the meaning of them may be introduced, but, it will hardly be said that, in a case where the meaning of the words is perfectly plain and where they express a fixed, clear and definite idea, wholly in harmony with the purpose of the contract and with its other provisions, the court will give to them a meaning which contradicts and varies their plain import, and will do this under circumstances where the parties would be denied the right to show by parol that such was the understanding or that the words were intended to express that meaning.

The purpose in dealing with a condition precedent of this character, however, is to determine not its reasonableness, but its meaning. If the right of the court to determine by construction, the meaning of a condition precedent in a policy containing the provision that "immediate" notice shall be given, depends on the fact that the word "immediate" is indefinite and ambiguous, as indicating a period or a limit of time, and if it is this uncertainty in its meaning which justified some of the courts in declaring that they would construe the word to mean notice within a reasonable time and therefore within a reasonable time "after knowledge of the accident," then it seems self-evident that if the limit of time indicated by the

word "immediate" is made certain by such words as "at the latest within ten days," the element of uncertainty upon which the construction of the courts is based, is utterly removed and absolute certainty with respect to the period of time is established by these words.

No court has undertaken to interfere with the contract of the parties where a condition precedent is expressed in terms so absolute and certain as are the terms of the one in the case at bar. The language of the condition is particularly emphatic. It not only says "within ten days," but apparently for the purpose of putting the matter beyond any question, it says "*and at the latest* within ten days."

Some pertinent language on this subject is found in the case of *Teutonia Ins. Co. vs. Johnson, et al.*, 82 S. W. 840, where the court said:

"The courts cannot make contracts between parties, nor can the courts at all times determine what is material and what is not. These things are left to the parties to determine for themselves, as a general rule. We cannot, also, see the particular reason the parties have in mind when making their contracts. We construe the meaning of these contracts when construction becomes necessary; but when undisputed conditions are made we are bound by them, as are the parties to such contracts."

It cannot be said in this case that the court had no right to take the question from the jury,

or to pass on the effect of the evidence, if the view he took of the condition was a correct one.

Where the facts are undisputed, the question becomes one of law for the court, and in this case, if the court is of the opinion that the policy required the giving of notice within ten days from the date of the accident, there was nothing for the jury to decide on this subject and the court properly took the question away from the jury by instructions.

Travelers' Ins. Co. vs. Myers, 57 N. E. 458.

Kansas & A. V. Ry. Co. vs. Ayers, 35 S. W. 515.

Nat'l Sur. Co. vs. Long, 125 F. 887.

To which might be added numberless other cases.

If the question was whether notice was given within a reasonable time, under the facts, if the facts were in dispute it would be a question for the jury. If the facts are not in dispute some of the cases hold that the question of reasonable time is for the jury and some hold that it is for the court.

In the case of *The Deer Trail etc. Mining Co. vs. Maryland Cas. Co.*, *supra*, the Supreme Court of the state of Washington held that it was a question of law for the court.

We submit that the court correctly rule on the question involved in the writ of error of John B. Stevens & Company.

**Brief of the Frankfort Marine, Accident
& Plate Glass Insurance Company,
a Corporation, Plaintiff in Error,
on Its Writ of Error.**

STATEMENT.

By stipulation found on page 2 of the transcript of the record, it was agreed that this plaintiff in error might incorporate its brief on its own writ of error with its brief in answer to the brief of John B. Stevens & Company, plaintiff in error, on its writ of error, and this part of our brief is devoted to the discussion of the writ of error of The Frankfort Marine, Accident & Plate Glass Insurance Company.

The policy was for indemnity against loss from legal liability. (Transcript of record, p. 46). It also provided that no action should lie against the company for any loss, unless it should be brought by the assured for loss actually sustained and paid in money. (Transcript of record, p. 52. Clause 16).

The policy also provided that upon the occurrence of an accident, whether any claim be made in respect thereof or not, the assured shall immediately and at the latest within ten days, give

notice in writing of the accident. (Transcript of record, p. 47).

It appeared from the evidence in the case that the accident occurred in June or July and that no notice was given until suit had been brought in the latter part of October. The court held and so instructed the jury, that defendant in error was not entitled to recover what it had paid in satisfaction of the amount recovered by Merrill against it, by reason of its not having given the notice required by the policy. The court, however, over the objection of plaintiff in error to the evidence, held that defendant in error was entitled to recover the attorney's fees and costs expended in the trial of the case of Merrill against defendant in error in the Superior Court of Pierce County, Washington (Transcript of record, p. 44) but was not entitled to recover the costs and attorney's fees incurred on the appeal of the case. The position of the court is clearly shown on pp. 34, 35 and 36 of the transcript of the record and is shown by the instructions given by the court.

At the conclusion of all the testimony plaintiff in error moved the court for a peremptory instruction to find in its favor, which was overruled, and thereafter it filed a motion for judgment in its favor notwithstanding the verdict. (Transcript of record, p. 26). This was overruled and an exception was taken. The position of plaintiff in error

was that the failure to give the notice required by the policy deprived defendant in error of the right to have the case defended. The court, however, took the position that the provision of the policy with reference to defending the case was not affected by the question of notice.

It was stipulated in the case that the bill of exception filed, which includes the amendments proposed by us, record p. 63-4, should be treated as the bill of exceptions of both parties, for the purpose of reviewing the correctness of the ruling of the court on the motion for judgment *non obstante veredicto*, as well as on the question raised by John B. Stevens & Company on its writ of error. (Transcript of record, p. 3).

ASSIGNMENT OF ERRORS OR STATEMENT OF POINTS RELIED ON.

In this writ of error we rely on the proposition that the defendant in error was not entitled to recover anything on account of its failure to give the notice required by the policy and that the giving of this notice was a condition precedent to defendant in error's right to have the case defended by plaintiff in error, and that therefore defendant in error was not entitled to recover the costs it paid for making the defense in the Superior Court of Pierce County, Washington.

Inasmuch as the question of the effect of the failure to give the notice within ten days after the accident occurred is fully discussed in the briefs on the writ of error of John B. Stevens & Company, we will not, of course, discuss the question here, but will simply affirm that a failure to give this notice deprived defendant in error of the right to recover any sum under the policy.

The court below should have granted our request for a peremptory instruction, or our motion for judgment notwithstanding the verdict, and we assign the error of the court in failing to grant the request and the motion.

ARGUMENT.

Clause 3 of the special agreements embraced in the policy contains this provision:

“That if any legal proceedings are taken to enforce a claim against the assured, which would be covered by this policy if the assured were legally liable in respect to such claim, the company shall, at its own cost, undertake the defense or settlement of such legal proceedings in the name and on behalf of the assured, and shall have entire control of such defense, whether legal liability on the part of the assured in respect to the claim is proven as the result of such proceedings or not.”

(Transcript of Record, p. 48, clause 3.)

It was contended in the court below, and the court adopted this view, that under the provision

quoted above this plaintiff in error was bound to defend the action of Merrill against the defendant in error, in the court of first instance, and at the same time the court decided that defendant in error had not given to plaintiff in error the notice of the accident to Merrill, required by the policy, and that, as a result thereof, it had no right to recover any loss thereunder. The theory on which this construction was placed on the provision in question is, that it was an independent undertaking on the part of plaintiff in error, and that the provision of the policy in reference to the notice of the accident did not in any way affect the question of its duty to defend the action.

It is evident from the character of the contract between the parties that this plaintiff in error had no interest in or concern with, any legal proceedings except those which were of such a character as might inflict a loss on defendant in error for which it would be entitled to indemnification by the terms of the policy. The difficulty of always determining in advance whether the proceeding was of such a character, led to the insertion in the policy, of the provision in question, for the mutual benefit of the parties to the contract. It was to the interest of plaintiff in error to have the right to defend the suit whenever defendant in error gave it the papers and indicated, in the manner pointed out in the policy, that it considered the proceeding

of such a character, and it was for the benefit of defendant in error that it should be so done. It was, however, not within the contemplation of the parties that plaintiff in error would defend all suits of every character brought against defendant in error, by its employees, in which it might be liable and sustain a loss thereby. Consequently it was expressly declared by the policy that the undertaking to defend the proceedings on the claims should be limited to those cases in which the character of the claims was such that, if the assured was liable therefor, they would be *covered* by the policy. In other words, the undertaking to defend was limited to such proceedings as were based on claims of such a character that if the assured was liable in respect thereto, and suffered loss from such liability, the company would be bound to indemnify it according to the terms of the policy.

The words "covered by the policy" are comprehensive. They involve a consideration of the question of the place where the accident occurred and the business in which the defendant in error was engaged, and we think also, the question whether even if defendant in error was legally liable in the proceeding, and if in other respects the claim of assured was covered by the policy, there would be a liability on the part of plaintiff in error to indemnify against the loss arising therefrom. In other words, they involve the question whether the

circumstances were such at the time of the commencement of the proceeding that there would be a right of indemnity in defendant in error for any loss it might sustain by reason thereof.

Unless there was a right to indemnify, plaintiff in error would have no interest whatever in the result of the proceeding, nor would defendant in error have any right to expect it to defend. As a matter of fact plaintiff in error could not defend under the circumstances shown in this case without waiving its right to disclaim liability, on account of the failure to give notice, unless it was done with an understanding with defendant in error, express or implied, that such a defense would not have such an effect.

If, without such an understanding, plaintiff in error proceeded to defend the action, such defense would be treated as a recognition of the fact that the claim was *covered by the policy* and it would be estopped from thereafter disputing its liability to indemnify defendant in error against the loss it might sustain by the proceeding. It is customary, under such circumstances, for the parties to enter into an express stipulation in which the assured agrees that if the company will defend the action, its doing so will not be treated as a recognition of its liability under the policy, and it is common, also, to insert in such stipulation the provision that such a defense of the action shall not be treated

as a waiver of the right of the company to disclaim liability for want of the required notice.

If we are correct in our assumption that the defense of an action by the insurance company, under the provision in question, where there had been a failure to give notice of the accident according to its terms, would, in the absence of an agreement on the subject, result in a waiver by the insurance company of its right to deny liability on account of a failure to give the notice, then if the construction which was put on this provision of the policy by counsel for defendant in error and the court, is correct, an anomalous situation would be presented in such a case. The absolute duty to defend under the contract would, by such a construction, be imposed on the company, and yet, if the company made this defense it would thereby waive its right to deny liability on account of the failure to give notice of the accident. The insurance company would be compelled to elect between defending the case and thereby assuming a liability which did not exist, or permitting the case to be defended by the assured and paying the expenses of such defense. This is not reasonable or just, and we know of no cause why this contract should be considered in a manner different from other contracts. If there is any ambiguity in the terms of the contract affecting this question, the fixed rule of construction must be applied to it.

That rule is, that the contract must be construed according to the intention of the parties, which, in the absence of other evidence, is to be deduced from the terms of the contract itself.

If we are not correct in our assumption that a defense of the character suggested by us would be a waiver of the right to deny liability on account of a failure to give notice, yet our conclusion is nevertheless correct, because there is nothing in the contract to suggest that the insurance company would undertake to defend any action where, owing to the situation at the time, there would be no liability on its part to indemnify against the loss that the assured might sustain by it.

If we look at this question from the standpoint of the assured, the unreasonableness of the construction which the court below placed on the provision in question becomes more apparent. If the terms of this provision compel the insurance company to defend the action where there was no notice and where it disclaims and has the right to disclaim liability for the lack of it, it follows of necessity, that this provision imposing the duty, gave an absolute right to do so and that this right to defend carries with it the right to control, compromise and settle the litigation, according to the provisions of clause 3, without regard to the wishes of the assured. Under such circumstances, will it be said that the provisions in question gave the right to the in-

insurance company to defend the action in such manner, against the wishes of the assured, when, at the same time, it disclaimed liability? If the insurance company disclaimed liability the assured might not, and probably would not, care to have it direct and control the litigation, unless it assumed liability by so doing, and still less would it be willing to have the litigation settled and compromised by the insurance company. There is no escape from the conclusion that, where the insurance company, by the terms of the policy, assumes the duty to defend the proceeding, it has entire control of it and can settle and compromise it at will, without regard to the wishes of the assured, and this right applies in all cases where the duty to defend exists under the policy. A construction that would impose a duty on the insurance company to defend, and consequently a right to defend and compromise, when it denied and had the right to deny any liability under the policy, would create a hardship on the assured not justified by the circumstances. Such a construction of the policy is wholly unwarranted. Yet, this construction of the policy necessarily follows from the one adopted by the court.

Reinstating the foregoing argument, we desire to say that the construction placed on the clause in question by the court below, leads to one of two results, each of which seriously affects the rights of one of the parties to the contract. These are:

First: If it is the duty of the insurance company, under the clause in question, to defend where there has been a failure to give notice, and there is consequently no liability on the part of the company, such defense constitutes an assumption of liability in the absence of an agreement to the contrary, and this construction, in common justice, ought not to be placed on the contract.

Second: If defending the action under such circumstances, does not amount to an assumption of liability, then notwithstanding the fact that the insurance company may be disclaiming liability, it has the duty imposed on it to defend the action and the right flows therefrom to compromise and settle it on such terms as it deems best, although there is no liability on its part to pay the amount of the compromise. This is not fair and was not contemplated by the parties.

The cases, therefore, in which the duty to defend is imposed on the insurance company, with the right to compromise and settle, are those where it is liable to the assured, and this is what is meant, in part, by the words "covered by the policy."

We think it must be conceded that the duty to defend with the right to compromise at will, which follows the duty to defend, only exists where, if the assured is liable the insurance company must indemnify it, and that the words "covered by the

policy" mean, in part, where there is a liability to indemnify the assured.

Clause 2 of the special agreements in the policy, throws some light on this question. After requiring notice of an accident, it says:

"If thereafter the assured shall receive notice of any claim arising out of an accident *duly reported to the company as before provided*, or of any legal proceedings to enforce *such claim*, he shall, within three days, give notice thereof to the company in like manner, and shall forward to the company every summons and process as soon as the same shall have been served on him."

(Transcript of Record, p. 48 to p.).

This clause, having relation to claims arising out of accident *duly reported* to the company and to legal proceedings to enforce *such claims*, is immediately followed by Section 3 which has already been set out by us, in which the obligation of plaintiff in error to defend proceedings or claims against defendant in error, is expressly limited and defined.

A consideration of the extract just set out, indicates that the claims with which plaintiff in error has any concern are such as grow out of accidents *duly reported* according to the terms of the clause, and that the legal proceedings of which defendant in error was required to notify it, were legal proceedings based on *such claims*. It is such

proceedings, which are those otherwise covered by the policy, which plaintiff in error undertook to defend.

The test of the duty to defend the suit, under the policy, is whether the suit is of such a character that if defendant in error was liable therein, plaintiff in error would be bound to indemnify it against the loss that would accrue to it thereby.

Considering Clauses 2 and 3 of the special agreements together, it would seem that they provide:

First: For notice of the accident.

Second: After the notice of the accident has been given, for notice of any claim arising out of an accident *duly reported*, or of any legal proceedings to enforce *such* claim, and the forwarding of the summons and process connected with the proceedings.

Third: A defense of certain actions and proceedings.

Having provided in Clause 2 for the giving of notice of the accident and for the giving of notice of any claims or proceedings based on accidents *duly reported*, which should come to the notice of the assured *after* he had given notice of the accident and for the forwarding of the summons and papers in such proceedings, to the insurance company, the next clause undertakes to define the

character of the proceedings the insurance company will defend. It does not undertake to defend *all* of the claims or proceedings which are embraced in Clause 2, but the clear implication is, that it will not defend any which are *not* embraced within the terms of Clause 2.

The legal proceedings referred to in Clause 3, are the same legal proceedings which are referred to in Clause 2 and they are proceedings to enforce a claim arising out of an accident *duly reported* to the company, in accordance with the first provision of Clause 2, and the undertaking to defend such proceedings is by Clause 3 limited to such as would be embraced within Clause 2, if the assured were legally liable in respect to the claim asserted in the proceedings.

The words "covered by the policy" must be held to relate to the provisions of Clause 2 and cases in which there is a compliance with the provisions thereof, as well as the other elements of the place and character of the accident and the business in which the employee was engaged at the time of the accident.

It is not a reasonable construction to say that these two clauses considered together, mean that if there is a failure to give notice, and if consequently there is no liability on the part of the insurance company, and if thereafter a proceeding

is commenced on a claim of which no notice was given, the insurance company is bound to defend such claim.

One of the reasons for requiring the summons and process to be forwarded to the insurance company, or notice of the claim to be given, was to afford it an opportunity to determine whether it would defend the action or not, and to give it an opportunity to say whether it would deny liability and refuse to defend the action, on account of a failure to give the notice required by Clause 2 of the policy, and to enable it, also, to determine whether the proceeding was of such a nature that the claim would be covered by the policy in other respects.

It is perfectly clear that the insurance company did not, by Clause 3, undertake to defend any legal proceedings, except those of which it had been given notice and the papers in which had been forwarded to it, as required by Clause 2. In fact the insurance company would have no notice of any claims or proceedings, except by such means, and the provision requiring such notice of proceedings or claims to be given to the insurance company, plainly and expressly limits this notice to claims arising out of an accident *duly reported* and "proceedings to enforce *such* claims."

We urgently insist that the court erred in holding that plaintiff in error, the insurance company,

was bound to defend the action even though notice had not been given according to the terms of the policy, and that the motion for judgment notwithstanding the verdict should have been granted, or the jury should have been instructed to bring in a verdict in favor of this plaintiff in error, and that the case should be reversed and remanded with instructions to the court below to render a judgment in favor of this plaintiff in error.

R. S. HOLT,

U. E. HARMON,

HUDSON, HOLT & HARMON,

Attorneys for The Frankfort Marine, Accident
& Plate Glass Insurance Company.

United States Circuit Court
of Appeals

For the Ninth Circuit

JOHN B. STEVENS & COMPANY,
Plaintiff in Error,

vs.

FRANKFORT MARINE, ACCI-
DENT & PLATE GLASS IN-
SURANCE COMPANY,
Defendant in Error.

AND

No. 2255

FRANKFORT MARINE, ACCI-
DENT & PLATE GLASS IN-
SURANCE COMPANY,
Plaintiff in Error,

vs.

JOHN B. STEVENS & COMPANY,
Defendant in Error.

REPLY BRIEF FOR JOHN B. STEVENS &
COMPANY.

We desire to make a very brief reply to the
brief filed by defendant in error.

(1) On page 25 *et seq* of the brief the authorities are distributed into eight classes, the eighth class being composed of the "Case at Bar," which is supposed to be *sui generis*, so that none of the authorities assigned to the other seven classes (all of which are confessedly opposed to defendant's position) are applicable, in the opinion of counsel.

The basis of the distinction seems to be that in the case at bar the requirement of notice was a "condition precedent," whereas in the other cases the requirement was a condition subsequent, and this contention is insisted on and the phrase "condition precedent" is reiterated on an average of three or four times to each page throughout the eighty-seven pages of the brief. In fact, there is literally nothing else in the brief.

We think it obvious that all this argument is entirely beside the mark. It has no relevancy whatever.

Thus, we may and do concede (aside from the question of prejudice) that the assured could not recover without complying with the condition requiring notice. Whether that requirement be termed a "condition precedent" or a "condition subsequent," or what not, assured was bound to comply therewith in order to recover. We have not and do not question this. What we contend is that the requirement under consideration must be reasonably construed so as to be possible of fulfillment. We maintain that the policy does not require notice, either immediately or within ten days, un-

less the assured was informed of the accident. Consequently, it follows that the requirement for notice “immediately, or at the latest within ten days,” was fully complied with by assured when it gave notice the same day it learned of the accident. So that it is too plain for contradiction that the issue of law for decision is, not whether a recovery will be allowed where the requirement for notice has been utterly disregarded, but whether the giving of notice “immediately, and within ten days” of the date assured learned of the accident, *was a full compliance with the requirement for notice*. Defendant’s brief is a labored effort to prove that the assured cannot recover without complying with the requirement for notice. But our contention is that we have fully complied with such requirement. It follows, therefore, that the argument of defendant in error is utterly irrelevant and immaterial. It is in no way pertinent to the question for decision.

On page 53 of the brief defendant admits that the entire argument was written before this Court had decided the case of the *Northwest Lumber Company*. In that case this Court does not once use the phrase “condition precedent,” but has considered the question exactly as it is presented in our opening brief, viz., as a question of interpretation of a written instrument. What did the parties mean by requiring notice “immediately, and at the latest within ten days,” of the occurrence of an accident? We say it means notice immediately or within ten days

from the date assured learned of the accident, assuming, of course, that the failure to learn of the accident was not due to negligence on assured's part. The Court held that the policy involved in that case was satisfied by notice within a reasonable time after assured learned of the accident. The clause there involved is as follows:

“Assured on the occurrence of an accident in respect of which claim can be made under this policy shall at once give written notice thereof to the company” * * *

This phrase is at least as definite in fixing the date of giving notice as the policy in controversy, requiring notice immediately, and at the latest within ten days, or within the time required by any state law. On page 38 of the brief counsel concedes that but for the ten-day feature notice within a reasonable time after learning of the accident would be sufficient. This concession utterly destroys counsel's whole argument. Thus, giving the word “immediately” its legal significance, the policy would read:

“That upon the occurrence of an accident, whether any claim be made in respect thereof or not, the assured shall within a reasonable time, and at the latest within ten days *after learning thereof*” give notice, etc.

The purpose of the phrase “within ten days” was to place a limitation upon the indefiniteness of the term “immediately” as defined by repeated judicial decisions. As counsel say, it is fair to presume that the insurance company was familiar with the meaning courts had uniformly placed on

the word “immediately,” and they proposed to make it definite by restricting ‘the reasonable time’ in which to give notice after learning of the accident to a period of ten days, except in states where by statute a longer period is allowed; as, for instance, in Texas, where ninety days is allowed. In such states the company still does business, notwithstanding it would be supposed from counsel’s argument they would withdraw in a panic. This last consideration speaks more than volumes for the good faith and candor of the argument concerning a “condition precedent.”

Counsel say on page 17 of the brief that no reason is suggested why assured did not learn of the accident, and on page 18 that mere ignorance is no excuse unless it be shown that notice would have been given sooner had the assured been advised of the accident.

As to the first suggestion, we need hardly remind the Court that it was shown that the injured party remained at work for more than a month after the alleged accident, and did not claim, or even know, of his own injury until long afterwards when he went to the hospital and submitted to an examination. He then, for the first time, attributed the injury to an accident he claimed to have met with weeks before while employed by assured. Under these circumstances it was, of course, impossible that assured should have known of the accident until the injured party made his claim through his attorneys, and the company was notified

the same day. This also answers the second suggestion, that it does not appear that notice would in any event have been given sooner, and shows conclusively that assured knew of and complied with the requirement of the policy for notice.

In reply to our contention that under the laws of Washington a compensated surety must show prejudice, counsel say that the allegation in the answer that the policy was made in Washington and governed by its laws was only for the purpose of enabling the Court to take notice that there is no statute in this state fixing the time in which a requirement for notice must be complied with. But we take it, counsel cannot limit the allegations of its pleadings to such purposes as suit its interests. The fact remains that this policy must be judged by the laws of Washington, and the case of *Beebe vs. Redward*, 35 W. 615, is conclusive of the proposition that in this state a compensated surety, or indemnitor cannot avoid its obligation for a mere technical breach of the contract. Prejudice must be shown. The Court say:

“The surety therefore cannot complain of any breach of the contract * * * that does not operate to his prejudice.”

In this case the company executed a bond of indemnity, indemnifying the obligee for breach by a contractor of a building contract. One of the terms of the contract provided that the building should be completed on August 1, 1901. The contract of indemnity executed by the United States Fidelity & Guaranty Company provided:

“That any suits at law or proceedings in equity brought against this bond, to recover any claim hereunder, must be instituted within six months after the first breach of said (building) contract.”

The contractor breached his contract by not completing the building in time. This breach was waived by the owner accepting the building in December, four months after the time stipulated.

The fidelity company contended that suit was not brought within six months from the date of the breach of the contract, and was therefore barred.

But the Court say:

“To relieve on this ground there must be a showing not only of departure from the terms of the contract but that the position of the surety has been so changed thereby as to result in prejudice to him.”

Lazelle vs. Empire State Surety Co., 58 W.
589.

This also was an action on a bond of indemnity securing performance of a building contract. The obligor contended that notice of default was not given in time. The Court say:

“The notice provision is inserted for the benefit of the surety. It is to give him notice of the doing or neglecting to do something by the contractor which will result in loss to the owner primarily, and thus subject the surety to a liability. And since the purpose of the provision is protection to the surety, when it appears that notice is given

in ample time to enable the surety to protect itself against loss or damage, it is sufficient, since it has accomplished that which it was the intent of the notice to accomplish. Hence, the rule has been established that the surety cannot complain when it can show no loss or substantial damage by reason of the failure to receive notice in the exact and technical language of the contract, or make it appear that its failure to receive notice has prevented it from taking proper steps for its protection." (Citing many authorities.)

The requirement for notice of a default under a building contract is just as important as notice of an accident. In either case, if the notice be not given and prejudice result the surety is and should be discharged, at least to the extent of the damage it has thereby sustained. But, in either case, since the purpose of the requirement is to enable the surety to protect itself, when notice has been given in ample time for that purpose no reason in law or morals is perceived why a compensated surety should be discharged from its obligation. At any rate, such is the law as it is written in Washington, and by it this case must be judged under defendant's own allegations. No distinction in principle is perceived between the case at bar and the cases cited. Evidently counsel so understood it, as it was unwilling to try its case in the State Courts, but removed it to the Circuit Court, hoping, no doubt, thereby to escape the Washington rule requiring a compensated indemnitor to show prejudice in order

to be discharged from its obligation.

We will answer but one other statement in defendant's brief, not because of any bearing it has on this case, but because of the outrageous aspersion on the character of the American Courts, both state and federal.

On page 32 of the brief the following occurs:

"After reading some of the opinions dealing with the question of the giving of notice under insurance policies, and observing the ingenuity and dexterity employed by those Courts to escape the conclusions which a proper regard for the fundamental rules of law should force on them, it is refreshing to read the clear and dignified opinion of a Court not animated by a desire to reach a forced conclusion, such as the one in the case of *Victorian Stevedoring Co. vs. Australian Acc. Ins. Co.*, 19 Victorian, 139."

Counsel then quotes from what is evidently an Australian case, and which apparently supports his contention, although not enough of the facts are stated to enable one to judge.

As a member of the bar of an American Court we desire to record a protest against this insulting reflection upon the learning and integrity of every American Court, state or federal, and with the observation that the necessity which counsel found himself under to resort to the antipodes for an authority which would support the unreasonable—we may say, the dishonest and unjust construction which is sought to be imposed on this contract—is a sufficient proof of its utterly untenable nature,

so far as American authority is concerned, we submit our case.

Respectfully submitted,
J. W. QUICK,
L. B. da PONTE,
Attorneys for Plaintiff in Error.

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IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

SOUTHERN PACIFIC COMPANY,
a corporation,

Plaintiff in Error,

vs.

JOHN WILBUR WARD,

Defendant in Error.

No. 2249
Petition for
Rehearing.

To the Honorable Judges of the United States
Circuit Court of Appeals for the Ninth Circuit:

The undersigned, on behalf of the plaintiff in error herein, present this petition and respectfully request that a rehearing of the cause be granted by this court for the following reasons:

I.

This court erred in affirming the action of the court below in denying the motion of plaintiff in error for a non-suit, and erred in affirming the action of the court below in refusing to give to the jury a direction to return a verdict for defendant in that court.

II.

This court erred in affirming the admissibility of evidence as to the crowded condition of said train after the accident, and in affirming the admissibility of evidence as to the difficulties of witness H. B. Light in boarding the train twenty-five minutes after the accident occurred.

III.

This court erred in affirming the propriety of instructions E, F, G and H, set forth in full, transcript pages 188 and 189.

IV.

This court erred in affirming the propriety of instruction M, as follows:

“I also instruct you that it is the duty of every public carrier of passengers to employ sufficient servants for the protection of such passengers, and it is under obligations to take due care to secure the safety of a passenger who is upon its premises peaceably for the purpose of boarding its trains.”

ARGUMENT

We shall endeavor very briefly to set forth the points upon which we rely to sustain our contention upon this petition. Addressing ourselves to the first point mentioned, namely, that the trial court erred in refusing to grant defendant's motion for non-suit, and in refusing to direct a verdict for defendant,

and the error of this court in affirming such action, we desire to state that we are so confident of the justness and reasonableness of our contention upon these points in our appeal in this case, that we feel that if the court ruled against us it was because of our inability and unfitness to make the points clear to the court, rather than from want of soundness in our position, or authorities to sustain them. Furthermore, we cannot but feel as we read the opinion of this court, that the court has strained in the interpretation of the evidence in this case to reach a conclusion affirming the judgment of the court below, to such an extent that it would seem that the mere fact of the injury itself has caused the court to feel the necessity of fixing the liability for the accident upon this plaintiff in error.

If the action of the trial court in denying the motion for the non-suit and in refusing to direct a verdict for defendant, was proper, it must have been predicated upon the proposition that there was evidence of negligence proximately contributing to the injury on the part of defendant, and no negligence upon Capt. Ward's part. In the evidence produced and in the opinion of this court upon the hearing of the appeal, three factors are mentioned and considered as being important in arriving at such a conclusion. These three factors are, First: The speed with which the train came into the station; Second: The failure on the part of the Railroad Company to properly regulate the movement of the

crowd, or protect it by means of servants; Third: The overcrowded condition of the cars and lack of adequate accommodations for all intending passengers on the train.

If it can be shown that the actions of the servants of the plaintiff in error with regard to these three matters did not constitute negligence and did not contribute or proximately cause the injury complained of, then our contention must be sustained.

It seems clear to us that no connection can be made by any argument, however ingenious, between the speed at which the train came into the station, and the injury to Capt. Ward. This is not the case of a person being hit by a moving train, where the person stood at a place toward which the train was moving, and by reason of its speed was unable to place himself out of danger. In fact, it is not a case of being hit by a train at all. It is a case of being run over by a train after having been pushed under it by other persons. The engine and several cars of the train had passed the spot where Capt. Ward was standing before the accident occurred. As is stated in the opinion of this court, some witnesses testified that the train came in in such a manner that they thought it was not going to stop, while others testified it came in in its usual manner and stopped at its usual place; in fact there is no testimony by those who claim the speed was excessive

that the place of stoppage was other than the usual one. This evidence, whichever contention may be taken, does not affect the question of the negligence of the Railroad Company in this case. When the train came into the station it was a signal of danger to those standing near the track, and the more rapidly it approached the more quickly was conveyed to the persons standing nearby, the necessity of seeking a place of safety. The track itself, and the approaching train, are both signals of danger. Let us suppose for a moment that Capt. Ward was awaiting the arrival of this train, and that the train was scheduled to stop at Paso Robles, but from the speed with which it came into the station, it appeared that it was not going to stop. If, in such a case, Capt. Ward had attempted to board the moving train, and had been thrown underneath and injured, could it be said that the Railroad Company would be liable for the injuries suffered by him because of its negligent failure to stop the train at a station where it was scheduled to stop? So, in this case, the fact that the train came into the station rapidly and appeared as if it might not stop, would be no justification for an intending passenger to put himself in a position with reference to the train where injury would be likely to result. Furthermore, if the train had slowed down to a speed of from two to five miles an hour some hundreds of feet before coming to the station, and had continued at that slow rate of speed to the place where it finally stopped, the movement of the crowd

to board the train, and take advantage of the accommodations offered, would have been precisely the same. This court says in its opinion: "Surely we cannot say as a matter of law that a train advertised to stop at a station, and which came into the depot at a fast rate, would repel a crowd of passengers waiting to board it, rather than draw them closer in a general endeavor to secure a position where they could get aboard and obtain seats. It was for the jury to apply its common sense to such a state of facts." We take it to be a matter of common sense, and a conclusion to which any and every reasonable person would come, that a swiftly moving train would naturally repel a crowd of passengers waiting to board it, rather than draw them closer, and that any and all persons would naturally be willing to walk more closely beside a slow moving train than beside a fast moving one. It seems clear to us, therefore, that the speed of the train, as an element of negligence on the part of this plaintiff in error, is entirely eliminated from consideration.

Now let us consider the question of the alleged negligence on the part of this plaintiff in error and its servants, in its failure to protect the passengers who were awaiting the arrival of this train.

The mere fact of the happening of the accident to Capt. Ward creates no presumption of negligence, nor does it require a strained interpretation or construction to be placed upon the evidence to

create a liability. The happening of the accident does not connote a failure to take precautions against such an occurrence. It is in evidence in this case, and this court has stated in its opinion, that the crowd at the station was quiet and orderly, and it is also in evidence that the movement of the crowd toward the coaches available for its accommodation, was the usual, customary movement of people desiring to board a train. The defendant in error says himself—"The crowd, as the engine passed me, absolutely never moved."

Even if we assume that the plaintiff in error should have anticipated that a large number of people would take advantage of the excursion rate on this occasion, and that a large crowd would be awaiting the arrival of this train, there is nothing in these facts alone, and nothing in all the evidence besides, upon which the necessity for extra precaution is to be predicated, except the mere fact of the accident. The open character of the station grounds is apparent from the sketch in the transcript, and there was ample room for a much larger crowd to have awaited the arrival of the train. Reasonable care had been exercised to provide a safe place for the intending passengers. The moving train itself constituted a far better warning of the danger of crowding than any servants of the plaintiff in error could have given. The plaintiff in error is not required to so safeguard its intending passengers against their own negligent or foolhardy acts, nor is

it required to make it impossible for the intending passengers to be injured by the negligent acts of third persons. If the railroads are to be held to such a degree of care, they are made insurers of the persons of all intending passengers. The courts have never gone to this extent, even in the matter of carriage of passengers on their trains. In fact, the carrier is bound only to use ordinary care, in view of the circumstances, toward intending passengers who are awaiting the arrival of a train at a station. *Falls vs. San Francisco, etc. R. R. Co.*, 97 Cal. 114. This case has been followed in many jurisdictions.

In short, the Falls case—which we are induced to believe has not received full consideration at the hands of this court—has been accepted in nearly every jurisdiction for the evident reason that it is based upon a logical conception that can not be successfully questioned. It proceeds upon the general theory that while the intending passenger is under his own control, it is expected that he will exercise his faculties in such a manner as not to bring injury upon himself; that the responsibility of the carrier for the highest degree of care does not commence until it has physical control of the passenger.

In the case of

Woodbury v. Maine Cen. R. R. Co., 43 L. R. A. (N. S.) 684 (85 Atl. 753),

which was a case of injury to the plaintiff, who went upon the station grounds to enter the defendant's cars, the Supreme Court of Maine, by Savage, J., said:

(1) "The defendant owed him the duty of exercising the care for his safety which a railroad company owes its passengers, while they are upon its platforms or grounds, either going or coming from trains. Care in the highest degree was not required. The care owed to a passenger in a moving train was not required. It was not required to keep the passenger absolutely safe. Its only duty was to exercise ordinary care to maintain the passageway in question in such a reasonably safe and suitable condition that passengers, who were themselves in the exercise of ordinary care, could walk over it safely. *Maxfield v. Maine C. R. Co.*, 100 Me. 79, 60 Atl. 710.

"(2) The plaintiff was bound to exercise ordinary care. All passengers are. But, unlike the passenger on a moving train, he was in a position to use his eyes and guide his steps. He could see and avert danger, if it existed. He could, by attention, protect himself."

We fail to observe any answer in the Court's opinion to the position taken by the plaintiff in error as to the rule announced in the Falls case:

"The defendant in error was at the station in the full possession of all his mental and physical faculties. The carrier had no physical or other control of him. He might, if it

pleased him, have taken this train or waited for another. No direction was held out to him as to his personal conduct. There were no appearances of control upon which he was either expressly or impliedly invited to rely. He could, if he desired, have chosen his associates and his position on the ground. The speed at which he would approach the train was a matter of his personal control. It was all optional with him as to how he should go upon the train. No physical control was exercised, or attempted to be exercised over him whatever. He was to all purposes a free agent, with the obligation resting upon him to act with discretion and care for his own safety. The rule for the highest degree of care is invoked only where there is a control with the carrier. If the passenger surrender himself to the direction and custody of the carrier, he then abandons his own course of action, and because of this control throws the responsibility for his protection upon the carrier; and because of this condition of abandonment of person and care, the custody rests with the carrier, and the law imposes upon the latter the exercise of the highest degree of care. There is another reason for the application of the rule for the highest degree of care, and that is that the increased hazards of transportation are only present when the passenger is in transit, and hence the greater the danger the higher the degree of care. In all the cases apparently sustaining the rule contended for by the defendant in error, and in which the court instructed the jury, the element of per-

sonal control of the intended passenger was absent, so that this case can be easily differentiated from the cases relied upon by counsel for the defendant in error. The rule invoked by the court below, in itself a strict one, should not be applied unless the elements for its application are present. It is conceded in this case that there was no control, or attempt to control the defendant in error while he was on the platform of the station or on the grounds of the station. To put it more accurately, he was allowed to act as his prudence might dictate. As the plaintiff in error had no control of him at this time, it can not be held to the strict accountability employed as a rule by the learned judge who tried the case in the court below."

In addition to the cases cited by plaintiff in error, the Falls case is sustained by the rule thus expressed in

Fremont, E. & M. V. R. Co. v. Hagblad,
4 L. R. A. (N. S.), 257:

"Therefore, with regard to platforms, stairs, waiting rooms in a station, the ground surrounding it, and other premises of a railroad company, its obligation to passengers is only one of ordinary care, in common with that of all other occupants of land or buildings inviting persons to enter thereon for compensation, since passengers are no more endangered in such places than they are on similar premises not belonging to a railroad company. *Pennsylvania Co. v. Marion*, 104 Ind. 239, 3 N. E.

74; *Kelly v. Manhattan R. Co.*, 112 N. Y. 443, 3 L. R. A. 74, 20 N. E. 383; *Lafflin v. Buffalo & S. W. R. Co.*, 106 N. Y. 136, 60 Am. Rep. 433, 12 N. E. 599; *Falls v. San Francisco & N. P. R. Co.*, 97 Cal. 114, 31 Pac. 901; *Moreland v. Boston & P. R. Corp.*, 141 Mass. 31, 6 N. E. 225; *Jordan v. New York, N. H. & H. R. Co.*, 165 Mass. 346, 32 L. R. A. 101, 52 Am. St. Rep. 522, 43 N. E. 111; *Stokes v. Suffolk & C. R. Co.*, 107 N. C. 178, 11 S. E. 999; *McDonald v. Chicago & N. W. R. Co.*, 26 Iowa, 124, 95 Am. Dec. 114; *Southern R. Co. v. Reeves*, 116 Ga. 743, 42 S. E. 1015."

All the witnesses testified that the crowd was orderly before the train came in, and we have the injured man's testimony that absolutely no movement occurred until after the engine had passed him. What warning, then, did the plaintiff in error have of the necessity for extra precaution? This was not a case similar to the case of a throng of children on a picnic, but was a crowd of grown men, accustomed to discipline, and sufficiently mature to appreciate the dangers incident to such a situation. As we have stated before in our brief upon appeal, there was nothing in the nature of the crowd attracted by the excursion to put the plaintiff in error upon notice that extra protection would be required, and further, that ordinary care, under the circumstances, such as suggested in the opinion of this court, would have been utterly inadequate to prevent the accident.

Whether the train was empty or crowded, the natural impulse of the crowd is to endeavor to get on as soon as possible and get a seat, and of what avail would a few servants of plaintiff in error have been to warn the crowd by voice not to hurry or push? The only protection which the railroad company could have prepared which would have been sufficient, under the decision in this case, would have been a substantial, permanent high iron fence, with a turnstile, so that it would have formed an impassable barrier between the crowd and the train, through which they could only pass, one by one. In some of the modern terminals, such barriers exist, but even there they are not erected for the protection of the passengers, but for the convenience of the railroads, so that tickets may be inspected before the passengers board the trains. Such an arrangement would be impossible at a way station, where passengers may board trains without showing their tickets, and where the station grounds and tracks must be open and passable for the proper conduct of the business.

We say, therefore, that nothing was left undone by the plaintiff in error, which, in the exercise of ordinary care under the circumstances, should have been done to control the crowd, and that it was not negligent in that respect. Furthermore, we maintain that Capt. Ward was negligent in walking so close to the moving train that he was likely to be jostled against it, or under the wheels. We be-

lieve that his conduct in this regard, having in mind both the approaching train, and the many other people waiting and anxious to board it, as he was, falls precisely within the rule laid down in *Holmes v. South Pacific Coast Ry. Co.*, 97 Cal. 161. That was a case of an intending passenger awaiting the arrival of a train, and walking up and down beside the track. He had walked this way for from five to eight minutes, and had just turned his back to the direction from which the train came, when it approached. The bell was ringing, but no whistle was sounded until within about eight feet of deceased, and when he heard the whistle, he made a startled movement, which landed him on the track, and he was struck. The court said, "Upon these facts, it is clear to us that the judgment must be sustained, as the deceased, in walking where he did, in dangerous proximity to the track of defendant, without looking or listening for the approach of the train for which he was waiting, and finally stepping partly upon the track in front of the moving engine, was guilty of such contributory negligence as defeats plaintiff's rights to recover in this action. Indeed, it would be difficult to imagine a clearer case of contributory negligence upon the part of a person injured than is presented by the evidence in this case."

In this connection, we desire to bring to the court's attention the rule of law that even though

the evidence is all one way on a certain point, if that evidence is inconsistent with the happening of the event, it will not be considered. In this case all the witnesses who testified on the matter at all, stated that Capt. Ward was not trying to board the train when he fell. In fact, the witness Capt. Light, in a part of his testimony quoted in the opinion of this court, said—"He did not try to board it. I know, because there was people between him and the train." We ask, in all sincerity, how it was possible if "there was people between him and the train", that he should have been pushed through those people and under the train, feet first, so that his leg was run over by the moving wheels? It seems to us that Capt. Light, in his loyalty to his fellow officer, has placed the defendant in error in a position where he could not, in the very nature of things, have had an accident. If that is the case, and the accident occurred, it seems to us clear that Capt. Ward must have been in the forefront of the movement, and that, by his own negligence, combined with that of the others crowding behind him, the accident resulted.

This brings us to the further consideration of the negligent acts of the crowd. Here was an open asphalted surface, level with the tracks, where the crowd was standing, ample to accommodate them all, with no necessity for rushing and crowding when the train arrived. Must the railroad company be presumed to have known that

they would act in a negligent and reckless manner, regardless of their own welfare and the welfare of others in the crowd, and must it have made such preparations as to make such acts impossible? The railroad company had a right to believe that they would move toward the train and board it in an orderly manner, using reasonable care for their own safety and for the safety of others, and if the contrary is true, how apparent it is that train guards, even in large numbers, would have been utterly inadequate. It would have taken a number sufficient to oppose the crowd successfully with physical force, under such circumstances.

We are thus brought to the inevitable conclusion that it was not any negligence on the part of plaintiff in error that caused the accident, or contributed proximately thereto, but that it was the negligence of defendant in error, coupled with the negligence of others in the crowd, that caused the accident. Even if we absolve the defendant in error of negligence, the reckless and negligent conduct of the others in the crowd in shoving him against and under the train, must be held to be the sole proximate cause of the accident; conduct which could not have been foreseen by plaintiff in error, and which its duty to the intending passenger did not require it to guard against.

To further elaborate these points it may be observed that the defendant in error relies in his

complaint (trans. p. 7, par. 7) upon the following allegations, as showing actionable negligence:

1. That "said defendant could accommodate only a small number of said crowd (500) with transportation";

2. And "defendant then well knew it had negligently failed in preparation to accommodate said crowd";

3. That "there would be a general movement and surging of such crowd to obtain and secure the said accommodations that then existed upon said train";

4. That "it would be extremely dangerous to approach said station * * * except at a rate of speed whereby said train was under perfect and instant control";

5. That "defendant well knew that it had neglected and failed to employ any means to maintain order in said crowd."

It is still a principle of law that in order to entitle an injured person to recover in an action of this kind, it must appear that the alleged negligence was the proximate cause of the injury. This is fundamental and is universally recognized.

1.

Taking the grounds alleged in the order stated, it is beyond the peradventure of a doubt that the defendant in error was entirely ignorant of this condition if it existed. Not being aware of the alleged lack of accommodation, such fact, if such it be, could by no means have operated upon his

mind, influenced his actions, or entered as a factor into the case. That which was not within his knowledge did not cause him to move forward toward the train. If, however, it be claimed that he must have known it inferentially, and as a result of this knowledge engaged in the scramble to gain a part of this limited accommodation, then his own act became and was the proximate cause of his injury, and he certainly can not recover.

2.

This subdivision of the alleged grounds entitling defendant in error to recover is practically answered by the considerations advanced under the foregoing head. However, it may be observed that it is at least passing strange that the railroad company should have known that it negligently failed in preparation when ample grounds were furnished for the people waiting to take the trains; that they were not overcrowded; that there was not the slightest indication that any facility was lacking to handle the crowd.

3.

The facts detailed by the witnesses for the defendant in error put it beyond question that this is a case where there was no reason to induce the belief in the mind of any person that there would be a "surging of the crowd"; on the contrary, the record is replete with declarations of witnesses to the effect that the crowd was orderly; that the

grounds were not overcrowded; no movement of any kind was engaged in by the crowd or any person there which would have caused the most careful man to believe that there was to be a rush. The railroad company had no better opportunity of observation on this score than the defendant in error had. He certainly anticipated no danger and made no effort to guard against the alleged surging crowd. He must have participated in the movement to reach the train regardless of surrounding circumstances. Certain it is that with all his friendly witnesses, no one tells of his resistance to the movement of the crowd or his protestations against any condition that existed at that time. The conditions as presented to him were of a character calculated to assure him that it was reasonably safe for him to proceed to the train as his own voluntary act. If this was the assumption under which he acted with equal powers and opportunities of observation, it appears clear to us that the railroad company can not be charged with negligence in this respect.

4.

We have heretofore shown in an earlier presentation of this case that the rate of speed can not be either alone or in connection with the other alleged acts of negligence the proximate cause of the injury. If the train approached the station at a rapid and dangerous rate of speed, it would be a proclamation of danger, and the ordinarily pru-

dent man would not be impelled to get in closer proximity to the train. The opinion states that Captain Ward was jostled or fell. Assuming this to be the fact, what relation does the speed bear to this act of falling or being jostled. If the train were coming in slowly it certainly would be an inducement for a greater rush because of the absence of the elements of danger, and the crowd would not then hesitate to approach the slowly moving train. By no method of reasoning can the speed of the train become a factor in this case, except so far as it affected and induced the crowd in its movement toward the train. We believe that a rapid speed would naturally and logically be a deterrent, and that it is so evident that no further discussion on this branch will be engaged in, except to say that Captain Ward in the full possession of all his faculties elected to go with the crowd, notwithstanding the actual speed of the train, whatever it may have been.

5.

Again, we repeat that there was no disorder in the crowd and nothing from which it could reasonably be apprehended, nor is it shown in evidence, that any act of the crowd caused the injury to Captain Ward. If, as the Court assumes, he "fell", then his fall, so far as the evidence discloses, was while he was in physical control of his own person (trans. p. 93). In point of fact, Captain Ward did not know or testify how the

act occurred. He says, "I don't know that any individual pushed me under the train at all. I don't know whose body was in contact with me when I fell" (trans. p. 100).

A casual consideration of the evidence in connection with the allegations of the complaint leads one to the conclusion that no ground relied upon by defendant in error is the proximate cause of the injury. In order to constitute a proximate cause for the injury it must appear that the alleged acts of negligence were "the nearest, the immediate, the direct cause" (Anderson's Law Dictionary), because proximate cause means an act concurring directly in producing the injury.

Troy v. Cape Fear & Y. C. R. Co., 6 S. E. 77.

In accordance with the settled rules, negligence can not be regarded as the proximate cause of an injury so long as it appears that some other thing contributed to produce the result.

Moore v. Inhabitants of Abbot, 32 Me. 46.

To bring this case within this rule of law, it must appear that the acts of plaintiff in error charged as negligence were the proximate cause in the sense that they were events "which in a natural and continuous sequence, unbroken by any new cause, produces that event, and without which that event would not have occurred."

Bosqui v. Sutro R. R. Co., 131 Cal. 390.

Behling v. S. W. Penn. Pipe L., 160 Pa. 359.

West v. Ward, 77 Iowa 323.

The test of proximate cause is whether the facts constitute a continuous succession of events so linked together that they become a natural whole, or whether the chain of events is so broken that the final result can not be said to be the natural and probable consequence of the primary cause.

Quinlan v. City of Philadelphia, 205 Pa. St. 309.

Submitted to the central idea, the controlling principle deducible from all the decisions, the case of the defendant in error signally fails to show actionable negligence, because there is no element connecting the alleged causes with the injury; for instance, the alleged speed of twenty-five miles an hour did not do it, because it must be conceded that the train was not going at that rate, or any excessive rate, when Captain Ward started for the train or when the accident occurred. Defendant in error testified "when I heard the—possibly the brakes go on—and about that time a surge of the crowd separated us" (trans. p. 92). Nor can it be said that there was any connection between the alleged speed of the train and the surging of the crowd, because the crowd did not surge until the train slackened its speed; nor the alleged lack of accommodation, because Captain Ward did not know anything about the accommodations. In other words, there is an unmistakable break in the

chain of causation. This we respectfully submit was supplied by the sympathy of the jury.

The essential element to constitute a proximate cause is palpably absent, and its absence makes this case one unsupported by required evidence; hence, a question of law is presented.

Loftus v. Dehail, 133 Cal. 219.

The previous discussion brings us naturally to the consideration of the propriety of the instruction—"I also instruct you that it is the duty of every public carrier of passengers to employ sufficient servants for the protection of such passengers, and it is under obligations to take due care to secure the safety of a passenger who is upon its premises peaceably for the purpose of boarding its trains." We maintain that such an instruction requires the plaintiff in error to *insure* the safety of its passengers, and that it is, therefore, an instruction which goes beyond what the law requires of plaintiff in error. All the argument on this point, *supra*, is applicable to our contention, and we will not repeat it. This court, however, in its endeavor to justify the instruction, points out that it is properly qualified, when taken in connection with the other instructions given. Such is not the case, as a careful consideration of those instructions will show. One of the other instructions was that a common carrier "owes to its passengers the duty to exercise the highest degree of care for their protection and safety which is consistent with

the practical operation of its road; and if you find from the testimony in this case that the plaintiff was on the platform to take a train with a ticket in his pocket, he was within the meaning of the rule—a passenger. That is, the railroad company owed him the same degree of care and protection that it owes to a passenger in actual transit.” Such is not the law in California, at least. As to the intending passenger at its station, the railroad company owes a duty of reasonable care, under the circumstances, while as to the passenger in transit, it owes the highest degree of care. And the reason for this is apparent. The intending passenger is under his own control entirely as he awaits the train, and can use care to protect himself, while in the case of the passenger upon the moving train, his safety is entirely in the hands of those operating the train and the railroad. Nothing that he can do will prevent the train from running into an open switch, or colliding with another train. He can only sit passively and trust to the servants of the railroad company, and if he refrains from jumping off the moving train, or from doing any other act of negligence on his part, he has the right to rely on the exercise of the highest degree of care on the part of the employes. Such a difference in the two situations is so clear, and the need for the distinction in the degree of care required so plain, that without an extended review of authorities, we are prepared to say that it is uniform throughout the courts of this country.

If the instruction complained of, therefore, is qualified only by another erroneous instruction, how well it is qualified! Let us take the phrase—"highest degree of care for their protection and safety consistent with the practical operation of the road." That is a statement—not a definition. Therefore, the jury, instead of looking to that instruction, even if not erroneous, to qualify the other, would naturally look to the other to find what the "highest degree of care" means. And in the instruction complained of they find that it goes to the extent of "sufficient servants for the protection of such passengers",—a body-guard forsooth,— and "to take due care to *secure* the safety of a passenger"; that is, make it impossible for him to be the victim of either the negligence of the servants of plaintiff in error, his own negligence, or the negligence of third parties.

We now come to consider the crowded condition of the train, after the accident, as evidence of negligence on the part of plaintiff in error. We have endeavored to look at this phase of the case from every possible angle, and have been unable to perceive any connection of this incident with the issues of this case. In this matter, this court said in its opinion, "This testimony may not have been competent from some standpoints, but as against the general objection made *it was relevant in that it helped to explain to the jury the extent of the crowd that had theretofore surged toward the cars*

and bore out the accuracy of the judgment of the people to the effect that accommodations were very limited, and thus the jury were better able to draw conclusions as to the conduct of the crowd when the train came in." For the life of us, we are unable to see how the court reached this conclusion. *It certainly affords no light on the question of how many were in the cars before the train arrived at Paso Robles.* The testimony to the effect that there were two day coaches and a smoking car was certainly all that was relevant or material as to the accommodations for the crowd, and that the movement of the crowd would have been different had the coaches been empty, as they may have been for all evidence to the contrary, has not even been suggested.

It is true that if this had been an action for damages for failure to provide accommodations for a passenger, this point would have been proper to consider, and the instructions complained of would have been justified. But the giving of these instructions, lettered E, F, G and H, on the duty of the carrier to run regular trains, provide safe and ample accommodations, and not to overcrowd its trains, was, in effect, holding plaintiff in error up to the jury as negligent as a matter of law, *in connection with this accident*, when such instructions had reference only to a condition that existed many minutes after the accident had oc-

curred. As was pertinently said in our brief upon appeal, the waiting crowd could have had no knowledge of the empty or loaded condition of the cars in the train before its arrival. The most that they could have known was that it was not a special train on the schedule, but one of the regular through trains operated by plaintiff in error, and as such was not expected to be made up for their special accommodation. So that we say, in holding plaintiff in error up to the jury as a law breaker, by giving these instructions, which could give no legitimate aid to the jury in determining the liability of this plaintiff in error upon the *issues involved* in the case, the trial court committed prejudicial error, requiring a reversal of the judgment by this court.

To sum up our position, briefly, we believe that a careful, fair consideration of the testimony shows that a non-suit should have been granted, or an instruction to find for this plaintiff in error should have been given, as requested; that the instructions complained of were erroneous, and highly prejudicial to this plaintiff in error; both as placing a greater burden upon it than is imposed by law, and as presenting it in a more unfavorable light to the jury than the issues of the case required or permitted. Upon these considerations, therefore,

we respectfully urge the court to grant a rehearing of this cause.

All of which is respectfully submitted.

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of Counsel.

CERTIFICATE OF COUNSEL.

I, J. W. McKINLEY, Counsel for the Plaintiff in Error in the above entitled action, do hereby certify that, in my judgment, the foregoing Petition for a Re-hearing is well founded and that it is not interposed for delay.

Dated, at Los Angeles, Cal., October 1913.

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